

2. The claimant alleges that the defendant unlawfully entered the land and constructed a barbed wire fence thereon and committed a nuisance by obstructing the claimant's right of way onto the land. The claimant brought a claim dated 22nd June, 2009 against the defendant, for damages for trespass and nuisance and for mesne profit interest and an injunction, court fees and costs.

3. The defendant in his defence states that he has been in possession and occupation of the land since 1989, and that he is entitled to prescriptive title to the land based on his adverse possession. The defendant further submits that the claimant's ownership of the land by Minister's Fiat is subject to his rights and interests. The defendant counterclaims against the claimant for damages for trespass, mesne profit of \$1000 per month from 1st January, 2008, a declaration that the claimant holds the land in trust for the defendant, an order commanding the claimant or Registrar to transfer the land to the defendant, and interest, costs and an injunction.

4. The evidence, as we saw above, is that the claimant owns 134,509 acres of land situate, according to the Minister's Fiat tendered in evidence, at Mussel Creek, Scotland Halfmoon Area. The defendant states that the claimant's land is not in Scotland Halfmoon, but I accept the location of the claimant's land as described in the Minister's Fiat. The evidence also shows that the defendant owns land by lease, about 60 acres which adjoin and are located north of the claimant's land. The defendant, a rancher and farmer uses his land as a pasture for the grazing of about 300 to 500 heads of cattle. The

claimant accepts that the defendant pastured cattle in that area since 1990; but he insists not on his land.

5. There is also evidence that a barbed wire fence was constructed by the defendant at the north west portion of the claimant's land. The barbed wire fence was not constructed along the entire length of the claimant's land; but started about 9 feet in the claimant's land and continued for about 150 feet on the said land.
6. The claimant said that when he went on the land he did not meet the defendant there nor did he see any neighbours. He said he had no knowledge that the defendant used his land as a pasture before he acquired title. He said when he acquired the land in 2005 it was "solid jungle." This evidence of the claimant is supported, to some extent, by the witnesses for the defendant, namely Steve Moody and Alvin Stephenson. Moody testified that the land was jungle in the 1990's. Stephenson testified that the claimant moved on the land in 2005 and it was jungle. He said it was the claimant who cleared the land by using a bulldozer. The claimant's case is that since his land was solid jungle no cattle was on his land, and he denied that his land was used by the defendant to raise and graze cattle.
7. The defendant, on the other hand, testified that he was in possession of the land since 1989. He said that he grazed cattle thereon, built a fence, cleared and maintained the land, planted trees, hunted animals and caught fish on the land; and therefore he acquired rights, title and

interest in the land by virtue of his adverse possession. Therefore, he is not a trespasser nor did he commit any act of nuisance.

8. I do not believe that the defendant had since 1989 possession and occupation of the 134.509 acres of land owned by the claimant. I believe he did construct the fence which enclosed a part of the claimant's land. I believe that the defendant removed the fence after the claimant filed for an injunction and the application for the injunction was served on him. But there is no evidence from the defendant as to when the fence was built.

9. The witness Stephenson, who was called by the defendant, testified that the defendant had no fence on the land in 1991. He said the defendant put up the fence in 2001 - 2002. He said the defendant's fence was taken down last year, which would be in 2008. There is evidence from the claimant that the defendant around July, 2008 placed the fence on the claimant land, and around July, 2009 having been served with an application for an injunction, he removed the fence.

The acquisition of land by prescription or adverse possession requires possession for a required period of years. Sections 138(1) & (2) of the Registered Land Act, Chapter 194 of the Laws of Belize state:

“138.-(1) Subject to subsection (2), the ownership of land may be acquired by open, peaceful and uninterrupted possession for a period of twelve

years and without the permission of any person lawfully entitled to such possession.

(2) In the case of national land other than the foreshore, the period of such possession shall be 30 years. Prescription shall not lie with regard to the foreshore.

There is evidence that the land was surveyed; but there is no evidence stating that the land falls within the Registered Land Act which makes provision for over-riding interests in land. Moreover, there is no claim or counterclaim in this case for an order for an over-riding interest under the said Act in the land. The Law of Property Act Chapter 190 of the Laws of Belize also provides for the acquisition of title to land by long possession. Section 42(1) states:

42.-(1) Title to the fee simple in any land, or to an easement, right or privilege in or over any land, including land belonging to the Government, may be acquired by continuous and undisturbed possession of that land for thirty years if such possession is established to the satisfaction of the Supreme Court which may issue a declaration of title in respect of the said land, easement, right or privilege in favour of the person who had such possession.

10. In order to prove adverse possession the defendant has to show, depending on which of the Acts above is relied upon, that he was in open, peaceful and uninterrupted possession or that he was in continuous and undisturbed possession of the land for the requisite period of years. As I said above, I do not believe the defendant when he said that he was in possession of the 134.509 acres of land owned by the claimant since 1989. Moreover based on the evidence above, the fence was not on the land for the required period of years to prove

adverse possession or acquisition of title by prescription or long possession by the defendant.

11. I have seen both the defendant and claimant give their evidence and I have observed their demeanour. I believe the evidence of the claimant that when he acquired his land in 2005 it was “solid jungle.” I do not believe the defendant that he planted trees, reared cattle, hunted animals and caught fish on the land owned by the claimant. But assuming that he occupied a portion of the land, perhaps where the fence was constructed, there is no evidence of the size of the portion; and as I said above, there is no evidence from the defendant himself as to when that fence was constructed. The evidence of the claimant that the fence was constructed in July 2008 would not support a claim for adverse possession to the area covered by the fence, nor would the evidence of defendant’s witnesses described above. The defendant, as we saw above, called two witnesses to support his case that he was in adverse possession of the land. They are the said Steve Moody and Alvin Stephenson.

12. Steve Moody in paragraph 3 of his witness statement said that the defendant was in “actual, continual and undisturbed occupation of the land” since 1989. In cross-examination he swears that paragraph 3 of his witness statement is true. He also said: “I do not know what all the words mean in paragraph 3.” He said that the words “continuous and undisturbed occupation” appearing in paragraph 3 meant that the defendant “is a hard working man, who do not disturb anybody.” He also said the word “occupation” meant the defendant owned the land.

13. The other witness for the defendant is Alvin Stephenson. He swore that he was a friend of the defendant for forty years. In paragraph 7 of his witness statement he said that the defendant was in “actual, continuous and undisturbed possession” of the land in dispute since 1991. But in cross-examination he said that he did not understand what the words “actual, continuous, and undisturbed possession” meant.
14. I do not accept the evidence of Moody and Stephenson that the defendant was in actual, continuous and undisturbed possession of the land. The defendant, in my view, has failed to prove that he was in adverse possession of the land. In order to prove adverse possession the defendant has to establish for the relevant period, factual possession of the land, and an intention to possess it. In *Toolsie Persaud Ltd. v. Andrew James Investment Ltd. and others* 2008 72 *W.L.R.* 292, *De La Bastide P and Hayton J* in the Caribbean Court of Justice laid down the relevant principles to prove adverse possession:

“The position is that a claimant to land by adverse possession needs to show that for the requisite period he (and any necessary predecessor) had (i) a sufficient degree of physical custody and control of the claimed land in the light of the land’s circumstances (Factual Control), and (ii) an intention to exercise such custody and control on his own behalf and for his own benefit independently of anyone else, except someone engaged with him in a joint enterprise on the land

(Intention to Possess). There must be an intention to make full use of the land in the way in which an owner would.”. see paragraph 28 of the judgment.

15. The defendant failed to satisfy the court on a balance of probabilities, that he had physical custody and control of the land and an intention to possess it to satisfy his counterclaim that he was in adverse possession of the land.
16. Perhaps the term “adverse possession” should be avoided and the principle expressed in simpler terms. This is the point Lord Browne Wilkinson makes in *JA Pye Oxford Ltd. v. Graham* 2002 3 A.E.R. 865, and approved by the CCJ in **Toolsie Persaud** above. His Lordship said:

“Much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner If the squatter is in possession the paper owner cannot be.”.

17. There is much support for avoiding the overworked and imprecise term “adverse possession.” The principle can be expressed by

stating that ownership of land may be acquired by open, peaceful, continuous, uninterrupted and undisturbed possession of the land for the requisite period.

18. I do not find on the facts of this case, that the defendant was in continuous, peaceful, undisturbed or uninterrupted possession of the land or any part thereof for the requisite period, and therefore the counterclaim fails.
19. As mentioned above, the claimant in the claim form claimed several remedies. But in the statement of case several of those remedies are omitted. The statement of case claims damages, interest, injunction and costs. There is no claim in the statement of case for rent or mesne profit, and there is no supporting evidence in the witness statement or otherwise proving an amount for rent or mesne profit.
20. The fence was on the claimant's land, according to the claimant's evidence, since July, 2008, until, as the claimant testified, "a couple of months ago." He was giving evidence in September, 2009; so I take it that the fence was removed around July, 2009. The fence was on the claimant's land for about one year according to the claimant, before it was removed. This must have caused some inconvenience or annoyance to the claimant, but not to a very large extent due to the size of the claimant's land, the fact that the land was not the claimant's place of residence, and the fact that it was "solid jungle". The claimant resided at Burrell Boom Village, Belize District, Belize. By constructing the fence on the claimant's land, the defendant

committed a trespass and a nuisance. A trespass to land is established if there is any unlawful entry by a person on the land in the possession of another person. The classic statement by Coleridge CJ in *Ellis v. Loftus Iron Co. (1874) L.R. 10 C.P.* captures the true definition of trespass:

“If the defendant place a part of his foot on the plaintiff’s land unlawfully, it is in law as much a trespass as if he had walked a half mile on it.”

But there is a difference between trespass and nuisance. Clerk and Lindsell on Torts define nuisance as follows:

“Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of his ownership or occupation of land” See 18th edition at page 973.

21. Though there was a trespass and nuisance, in the absence of specific evidence of damage caused to the claimant by the nuisance, and due to the size of the land, and the fact that the claimant did not reside on the land which was described as solid jungle, I think an award of nominal damages is appropriate, bearing in mind the circumstances of this case. On a visit to the scene on 19th December, 2009, it was observed that the claimant constructed his own fence, demarcating his land from the defendant’s land which adjoins the claimant land. The defendant’s land is also fenced around. This is some indication that previous problems of trespass and nuisance may not arise in the future.

Conclusion

22. The defendant has failed to prove his counterclaim that he was in adverse possession of the land owned by the claimant. The claimant has proven that the defendant committed the tort of trespass on his land and nuisance by constructing a fence on the claimant's land. Nominal damages, on the facts of this case, would be a suitable remedy.

23. I therefore make the following orders:-
 1. The defendant to pay to the claimant nominal damages in the sum of \$2,000 for trespass and nuisance.
 2. Interest on the said sum of \$2,000 at the rate of 6% per annum from 1st August, 2008 until the sum is fully paid.
 3. An injunction is granted restraining the defendant, servants, and agents from residing, occupying, going on, or causing cattle to grazed on, the claimant's land situate along Mussel Creek, Scotland Halfmoon area, Belize District bounded and described as shown by plan No. 401 of 2005.
 4. The counterclaim is dismissed.
 5. Each party shall bear his own costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
15th January, 2010

