

whether possession by the son can be regarded as possession of the applicant in this case.

2. Mr. Harrison August Sr. has applied under s: 42 of the Law of Property Act, cap. 190, Laws of Belize, for a declaration of “title in fee simple” in a parcel of land in Belize City. The Land is described as: “ALL THAT PIECE OF PARCEL OF LAND situate on Tigris Street, Mesopotamia Area on the South Side of town of Belize (now City) numbered 1560..... as shown by plan No. 69 of 1927..... recorded in Crown Lands Book Plan No. 11 at folio 437”. The application has been opposed by Mr. Oswald Patten, the uncle of the applicant. Mr. O. Patten is the brother of the applicant’s mother , Eva Patten August. He responded to the service of the application on him.

3. I have used the word, “applied”, and not the word, “petitioned”, deliberately, although the proceedings were commenced by a petition filed on 15th November, 2004. Subsection (3) of s: 42 of the Law of Property Act provides for an, “ application for a declaration of title”, to be made. That is enough to change prior practice by petition to that by application, in my view. Moreover, historically petition was a

process which requested discretion not a right. I think s: 42 provided for a right.

4. This Court has always insisted that an application under s: 42 of the Law of Property Act must be advertised in two consecutive issues of a local newspaper and, optionally in the Government gazette, and has sometimes, if desirable, required that an application be served on persons other than those on adjoining lands. The objective in that direction order is the same as the objectives in: rule 11.16 which permits a person not served with an application generally to apply to have the order made set aside; rule 19.3 which allows adding and substituting parties by court; and rule 5:18 which allows service of court process on unoccupied land to be by advertisement and affixing the process on the land. Often the direction order I made led to justice to persons who had genuine claims against some applications, and to persons such as brothers and sisters who have concurrent claims, coming forward to join in or oppose the applications. I have not encountered any suggestion by any learned attorney that advertising applications made under s: 42 of the Act is an unfair or a prejudicial practice. On the other hand, I have dealt with cases,

though not many, in which it has been alleged that earlier applications for title had not come to the information of the claimants, or had been fraudulently made, one such case was in court earlier today.

5. Section 42 (1) of the Law of Property Act which the applicant relies on provides as follows:

“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 undisturbed possession of that land for 30 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 has such possession”.

The Facts:

6. Mr. H. August Sr.’s application is based on these facts. Mr. Samuel Patten, the grandfather of Mr. H. August Sr. and, the father of Mr.

Oswald Patten was the owner of the land, parcel 1560 Tigris Street, Belize City, conveyed to him by an indenture dated 2nd July, 1935, duly recorded in Deeds Book, Volume 32 at folio 551. He died on 7th December 1936, leaving on the property, his wife Amybell Reid Patten and three children: Oswald Patten, Eva Patten and Marjorie Patten. Oswald Patten said that his father built house No. 27 and that he, Oswald Patten, built No. 29 and in the course of building it, Mr. Samuel August, the applicant's father who lived elsewhere that time, helped Mr. O. Patten with the building work. Mr. H. August Sr. said that there was only one house No. 27 on the land, the other, No. 29, was built subsequently in 1951 by his mother and father, Mr. Charles August, after her mother obtained permission from his grandmother to build on the land. The applicant had not been born; he was born in 1960. The applicant stated further, that Mr. Charles August assumed responsibility to pay the property tax on house No. 29 to the Town Council from 1961. He produced a letter from the City Council stating that Charles August paid the tax from 1961 to 2003. In 1974 Amybell Reid Patten died. In 1977 Marjorie left the property and lived with her husband and children elsewhere in Belize City. She died in 1999. On 5th November, 1999, Charles August died, and on

6th April 2003, Eva August died, and soon after, Mr. Patten served a written notice on the applicant's son, Mr. Harrison August Jr. to vacate the premises in one year. The applicant said he has lived on the property in house No. 29 since birth in 1960. Of course, that part of the testimony about when house No. 29 was built was hearsay, to be given what little weight it deserves.

7. The material parts of the testimony of Mr. August Sr. which were contested were that: his father and mother built house No. 29 on the parcel of land, had exclusive authority and control of it, paid property tax on it, maintained it, rented out part of it, and that his father and mother died leaving Mr. Harrison August Sr. in the house, he lived on the property since birth and still lives there.

8. The facts on which Mr. Patten relied for opposing the application for a declaration of title to parcel No: 1560 differed on several material facts. He produced an indenture dated 30th November, 1964, to show that in 1964, the property, No. 1560 Tigris Street, was transferred by his mother to him alone, Eva signed as a witness. The recital of the conveyance mentioned that the property had belonged to the mother

and Mr. O. Patten. He testified that although his mother lived on the property until death, and although he allowed his sisters to live on the property, he always had and exercised authority and control over the property, did repairs on them, paid property tax or his sister Eva and her husband paid on his instruction and on his behalf, and the tenants on the property were his tenants. He lived in Orange Walk Town where he worked as a manager for Belize Electricity. He always returned to the property and stayed on week-ends. He remained in Orange Walk after retirement. In short, Mr. Patten's case was that Mr. Harrison August Sr. had no evidence to show that he qualified as a person who has been in, "*continuous and undisturbed possession for 30 years*", or at all, thereby dispossessing Mr. Patten, so that Mr. Harrison August Sr. could apply for a declaration of a fee simple title in the property, under s: 42 (1) of the Law of the Property Act.

9. The incident which led to Mr. Harrison August Sr. filing this application is the letter that Mr. Patten wrote after the death of Eva, his sister, and the applicant's mother, giving notice to Mr. Harrison August Jr. to vacate the property. At the time it was Mr. Harrison August Jr. the son, aged 28 years, not the father, who lived on the

property. Mr. Harrison August Sr. lived in the United States of America.

Determination: (The law and aim).

10. There are several statutory laws in Belize under which title may be acquired; either positively under ***s: 42 of the Laws of Property Act,*** and ***the Prescription Act, Cap. 192,*** or negatively as ***under s: 138 of the Registered Land Act, Cap. 194*** by ouster of the title holder by a trespasser who has been on registered land for 12 years, and ***under s: 12 of the Limitation Act, Cap. 191,*** by a title holder losing the right to claim back his land from a trespasser after 12 years. These Belize statues adopted the provisions of the Real Property Limitation (No 1) Act, 1833 (UK) and the Real Property Limitation Act (1874)(UK), which altered the Common Law of '*non adverse possession*', which was that: '*the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition, namely, adverse possession, there had to be something in the nature of ouster*'. It was not an easy matter to prove.

11. In this case the applicant choose to use *s: 42 of the Laws of Property Act*. Mr. Oswald Patten is the title holder by a recorded conveyance, “the paper owner”, He is merely a respondent. He did not take any court proceedings to enforce his right, although he has asserted it in no uncertain terms by issuing a notice to vacate to the applicant’s son. He might have taken court action had the applicant not done so and brought Mr. Patten to court.

12. By his application under *s: 42 of the Laws of Property Act*, Mr. Harrison August Sr. sought to establish a right to the land, and from the right he claimed a fee simple title. He is not the paper owner, he relied on continuous and undisturbed possession, the so-called “possessory title”. It is not a legal estate, a legal title. He desires to establish a legal title. His application is akin to proceedings to quiet title by removing uncertainties about it. Legal title is defined in *s: 3 of the Act*.

13. There has been no suggestion that parcel 1560 is in “a registration area”, in which case, the law applicable would be *s: 138 of the Land Registration Act*. Had parcel 1560 been in a registration area, Mr,

Harrison August Sr. would have to apply directly to the Registrar of Lands under *s: 138 (3) of that Act*, to have him registered as the proprietor thereof. He would come to the Supreme Court only in the event of an appeal. An example is the case of *Olga Idolly Hall v The Registrar of Lands and Violet Kirkwood, Civil Action No. 21 of 2004*, confirmed on appeal. Mr. Harrison August Sr. would have to show to the Registrar of Lands that he had acquired “*ownership of the land by open, peaceful and uninterrupted possession for a period of twelve years and without the permission of any person lawfully entitled to such possession*”.

14. Section 42 of the Law of Property Act has become an important law in Belize in the acquisition of title outside transfer transactions and in obtaining certainty in title. Many applications have been made and continue to be made for declaration by the Supreme Court, of title to fee simple, by people who have been in occupation of land or have control of it, in towns and countryside alike, or by people who have succeeded the original occupiers. A declaration by court followed by the issuance of a certificate of a fee simple title converts the mere possession, the possessory title of the occupier into a legal estate, a

legal title – see *s: 42 (4) of the Act*. The declaration may be made in regard to any land occupied for 30 years, it is an important assurance of title. Whether the section is used to establish title in land that had not belonged to anyone, or to oust a previous title holder after 30 years, is of no practical importance. In my experience in this court, the aim of most applicants for a declaration of title under s: 42 of the Law of Property Act have been to eliminate any uncertainty and to secure title in the applicants.

15. Both learned counsel in their submission stated the law correctly. They submitted that for the court to make a declaration of title under s: 42 of the Law of Property Act, there must be evidence of : 1. the fact of possession by the applicant, and 2. the *animus possidendi*, the intention of the applicant to have exclusive possession. I add a third, that there must be evidence proving that 3. the applicant has been in possession for thirty years or more from the date the applicant first took possession to the date he filed the application for title.

16. The Belize case, *Charles Ristan Young v Richard Young, Civil Appeal No. 5 of 1982*, cited by learned counsel Mr. Elrington S.C., is

a good example of a case in which both the factual possession and the intention to exclude others were borne out by the evidence. In the case, the appellant, the brother of the respondent, opposed the application by his brother for a declaration of a fee simple title, and claimed possession and title for himself. The land was originally granted by the Crown to one Margaret Eugenie Smith in 1916, but the father of the two brothers began to pay the property tax on it some time after that until 1929 when the father requested the applicant who entered the land that year to pay the tax and he started to pay. His father told him that the land belonged to one Samuel Young. After the death of the father the applicant regarded himself as holding the land for Samuel Young. By 1950 he had stopped hearing from Samuel Young and nobody knew the whereabouts of Samuel Young or what happen to him. From that year, the applicant decided to pay tax in his own name. From 1954 to 1981, he worked the land for cultivation without the consent or permission of anyone. Margaret Smith had died and no claim to the land had been made on behalf of her estate. It was confirmed on appeal that the applicant established by evidence that from 1950 when he stopped paying tax on behalf of Samuel Young, to 1981, he had sole and undisturbed

possession of the land, the period was more than 30 years, he was entitled to a declaration of title. The case was decided on the ground of possession by the applicant, not on the ground of the estate of their deceased father.

17. The English case, *Buckinghamshire County Council v Moran* [1989] 2 All E.R. 225, cited by learned counsel Mr. A. Sylvester, is an excellent exposition of the requirement to prove the fact of possession and the *animus possidendi*, the intention to exclude all the world and have exclusive possession. It is also important about discarding the rule that there was an implied licence by the owner of unoccupied land to a squatter, if the occupation by the squatter was not inconsistent with the future use intended by the owner, and the rule that in regard to unoccupied land the intention of the owner was what mattered. In the case, it was confirmed on appeal that enclosing the Council's land and treating it as part of the garden of the defendant's house was sufficient demonstration of exclusive possession even though it was not inconsistent with the intention of the Council to use the land in the future for a road. Accordingly the Council did not succeed on the claim to recover possession of its land

brought outside the 12 years limitation period for bringing action to claim possession of land, under *s: 12 of the Limitation Act 1980 (UK)*, because Mr. Moran successfully proved both the fact of possession and the *animus possidendi*.

Determination: (Finally).

18. Despite some areas of complicated facts and points of law in this application, it is a simple one to decide. There are two simple and short ways in which it is dismissable. The first is: assuming that the applicant has proved the fact of possession and the intention to have exclusive possession, an obvious obstacle remained; he did not prove that the exclusive possession lasted for 30 years. The possession that he relied on as his possession started with that of the mother, Eva, which possession commenced in 1974, when grandmother Amybell died. Before that, possession belonged to grandmother Amybell and Mr. O. Patten jointly. That is borne out by the testimony of the applicant that his mother got permission to build on the land from the grandmother. So when the grandmother was alive the mother did not have possession let alone exclusive possession. Such a family arrangement shows that possession is by consent of the owner as in,

Murphy v Murphy (1980) IR 183, and in *Riley v Brathwaite (1979) WIR66*. In the latter Barbados case, it was held on appeal that the possession of the appellant before the mother died was by permission and consent of the mother, his exclusive possession commenced after her death and lasted beyond the statutory limitation period for claiming back land. The appeal was successful.

19. The day and month in which grandmother died are not in evidence. I cannot conclude that she died after 15th November 1974, so that when this application was filed on 15th November 2007, the requisite period of 30 years possession had been attained. Mr. Harrison August Sr.'s application fails on the ground that it was made before 30 years of possession.

20. The second simple short way to dismiss the application is: assuming that there has been proof of factual possession for 30 years, evidence of the *animus possidendi* all through the 30 years would be lacking. Let me assume again that for the period from 2003, to 15th November 2004, when the applicant or his son was on the land, there has been the intention to have exclusive possession, the difficulty remained,

whether there was the intention to have exclusive possession before the death of mother Eva in 2003. The evidence that Eva obtained permission to build proved instead that there was no intention on her part to have exclusive possession. It follows that Eva, her husband, her son the applicant, and her grandson Harrison August Jr. were on the property by permission. Any possession they may have had of any part of the parcel of land would be by consent of grandmother Amybell. A similar case is *Errington v Errington [1952] 1 All E.R. 149*. The applicant, who claimed to derive part of his possession from the mother could not then get possession which included the intention to exclude all the world for the period up to 2003, when his mother did not have that intention. The contrary conclusion would be possible only if mother Eva and maybe, father Samuel August were alive and testified as to their intention to exclude all others from an earlier date, supposedly 1951, and backed up their testimonies with evidence of what they did which manifested that intention.

21. The evidence about payment of property tax and collection of rent, by Mr. Charles August from 1961 to 1974 when Amybell died would not be sufficient proof of an intention to have exclusive possession,

since Charles August knew he was on the land by permission of Amybell. In any case, the evidence was inaccurate in as far as it gave the period of payment of tax by Mr. Charles August as 1961 to 2003. He died on 15th November 1999, he could have not continued payment upto 4 years later. Moreover, the evidence has been successfully countered by a more plausible explanation by Mr. Patten. He said that because he gave his sister permission to live on the property he told the husband to pay the property tax, and that when the matter was raised, he went to the City Council and rectified the record. About the collection of rent, he said that his sister collected it for him and when a particular tenant defaulted and did not vacate the premises, he, Mr. Patten, took the matter to the magistrate's court and got an eviction order. The applicant conceded in crossexamination that it was Mr. Patten who obtained the eviction order. The application is also dismissable for lack of evidence proving intention over 30 years to have exclusive possession.

22. Apart from the above straightforward points on which Mr. Harrison August Sr.'s application fails, the application was beset with several difficulties raising complex points of law.

23. The first complex point concerns proof of possession as a matter of fact. The applicant has simply not proved any possession of his own or possession that he could derive from someone else, let alone possession for 30 years. He does not live on the property now, he lives in the U.S.A. He did not lead evidence about when he left house No. 29, but he told the court that when his mother died he was in the USA, and when his son told him about the letter to vacate, he was in the U.S.A., he came to attend to the matter. The other evidence about where the applicant lived before he went to U.S.A. came from Mr. Patten. He said that Mr. H. August Sr. was “put out of the house” by his mother when he was a teenager, he lived on Lightburn Alley and on Pen Road, in Belize City and went to the U.S.A. On a balance of probabilities, I cannot conclude that the applicant has proved that he lived at parcel 1560 Tigris Street Belize City, and had possession of it at any one time.

24. The applicant sought to adopt the possession of his mother. The law in *s: 42 (4) of the Act*, allows one person to derive all or part of his possession from that of another person. In this case it was impossible

for the applicant to derive possession from that of the mother. There has been no evidence that when his mother died in 2003, he was living on the property and so he was left in possession, continued it or in some other way became entitled to it so that he could derive part or all of his possession from that of the mother. Rather, the evidence showed that the applicant's son was living on the property; he is the one who could be taken as having been left in possession of it. So the possession of the grandson of Eva, not of her son, continued from that of Eva, and the grandson would be the one to derive as his, the possession of the grandmother. This is a claim based purely on possession, not on succeeding to the deceased estate of Eva, the mother.

25. The next question in determining possession, if any, of the applicant is whether he could adopt the possession of his son Harrison August Jr, as his own under ***Section 42 (3) of the Act***. An example of when a father could derive his possession from the possession of the son is when the son dies intestate, without leaving a surviving wife or child. In this case, the son still lives on the property, the father has not physically moved onto the property to carry on with the possession of

the son. I do not see how the son who is 28 years old owes possession which he continued from that of his grandmother to the father who was not on the land; and I do not see how the father who lives elsewhere can claim the possession of the adult son as his own. By this reasoning, again the applicant has failed to prove that he had possession of the land as a matter of fact at any one time.

26. I think the son would be a better applicant because he is the one who had possession which he derived from the grandmother. The total possession period was however, short of 30 years by a month and 15 days. He would also be faced with the problem as to whether the possession was exclusive possession, that is, whether there was the requisite *animus possidendi*.
27. The evidence has not proved that the applicant had possession, instead it has proved that he never had possession at all.
28. Major complications of the issues arose from the change in the case of the applicant in the course of trial. Originally, the applicant asked for: “a declaration of title in fee simple in respect of the said land in

favour of your petitioner”. The land was described in the schedule to the application as: “ALL THAT PIECE OR PARCEL of land on Tigris Street.... Numbered 1560....” In the course of trial, the applicant abandoned claim to the whole parcel 1560, and asked for a declaration of title in respect of only part of the parcel whereon house No. 29 stands. That may have been forced on him as the result of his admission in crossexamination that “house No. 27 belonged to Mr. Patten, and has always been.” The admission ended Mr. Harrison August Sr’s claim and application for a declaration of title to that part of parcel 1560 on which house No. 27 stands.

29. The admission also introduced a new issue of law and more evidential burden on Mr. Harrison August Sr. The new issue is whether the applicant, were he to prove continuous and undisturbed possession of house No. 29 only, would be entitled to a declaration of title to only that part of parcel No. 1560 on which house No. 29 stands.

30. Case law is now clear that title to a whole tract of land which has a defined boundary may be acquired by exclusive possession of only a

part if the possession of the part relates to the possession of the entirety - see two cases from the *Bahamas; Paradise Beach and Transportation Co. Ltd, v Price – Robinson and others [1968] A.C. 1072 PC*, and *Higgs and Another v Nassaurian Ltd [1975] 1 All E.R. 95 C.A.*

31. It has also been established that having exclusive possession of only a portion of a whole tract of land may enure into possessory title and lead to a claim of legal title to that portion only. In the Barbados Case, *Riley v Brathwaite*, the appellant, who was born before his mother married, was invited by his mother on her land of over an acre. He put his chattel house (wooden house) on 7,000 square feet of that land, fenced it and occupied it for 34 years after the death of the mother without being asked to leave by the administrator of the estate of the deceased mother or by the heir-at-law. The entire land was transferred to a sister who then mortgaged it. It was held on appeal that he proved exclusive possession of the 7,000 square feet portion and was entitled to a declaration of title to the portion. The mortgagee, who sought to foreclose in respect of the whole tract of land owned by the sister, lost the appeal.

32. An insurmountable difficulty in this application is about the evidence to prove exclusive possession of house No. 29 and the land area on which it stands. The parcel of land is a small one measuring only 49 feet 2 ½ inches by 95 feet and 1 ½ inches. Mr Patten said he built the house, but the applicant said that his father built it in 1951 before the applicant was born. The better evidence is of course that from Mr. Patten. Again Mr. Patten said that there was a cement built walkway between the two houses, No. 27 and No. 29, the applicant denied. That would be evidence of separate possession of each house and the portion of land around it. The applicant further said that his parents told him that they owned house No. 29, and he contended that his parents and him had exclusive possession, yet he admitted that his parents, their children, grandmother Reid Patten and the children of Mr. Patten lived upstairs of No. 29, that aunt Marjorie and her children lived downstairs. He explained that house No. 27 was rented out. The applicant also admitted that Mr. Patten son's currently lives in one of the rooms of No. 29, he has been there for 9 months, although the applicant said, by his permission. The applicant's own witness, Mr. Llewelyn, said that his parents, Marjorie and Mr. Gentle

and their children including him, lived downstairs in No. 29, and that his mother told him that downstairs belonged to the mother Marjorie, and upstairs belonged to the aunt Eva, the applicant's mother. Mr. Gentle further said that his mother told him that grandmother owned the land.

33. What is admissible evidence from the above outline of facts proved a family arrangement by the consent of the grandmother, for her two daughter and their husbands and children to live on parcel No. 1560 with her and to share the use of both houses and the common areas of the parcel. The evidence also proved that Mr. Patten approved of the arrangement and consented to the extended family living there. His own children lived there and he came over on weekends. No one in the extended family could claim separate possession of either of the house or any particular portion of the land area, except Mr. Patten who had the paper title and who nobody tried to prevent coming to spend weekends on the property. The case of *Errington v Errington [1952] 1 All E.R. 149 CA*, is an example of a family arrangement by which a son and his wife were let into possession by a father. It was decided that the arrangement was a licence coupled with a contract

requiring the son and wife to pay the mortgage instalment. In my view, the arrangement in this case was a licence, but there was no contract attached to it. I did not accept that the applicant's parents built house No. 29.

34. Another complication would arise in regard to the requirements of the Land utilization Act Cap 188, Laws of Belize, and of the Housing and Town Planning Act, Cap 182, Laws of Belize. Given the small size of the parcel of land in question one would like to know if a declaration of title is made in respect of a portion, the apportionment would not conflict with the requirements under the Acts. Fortunately the question does not arise since this application fails on many other grounds.

35. Finally I have to mention that the applicant questioned the conveyance of 1964 to Mr. O. Patten, stating that the applicant's mother had told him that the conveyance was a forgery. I did not believe that. The applicant would have taken immediate step to put matters right. In any case, this application was based on possession, not on a challenge to Mr. O. Patten's title. The applicant had to

prove his continuous and undisturbed possession for 30 years, notwithstanding any defect in the title of Mr. Patten. Were the applicant to prove that the title of Mr. Patten was defective, the applicant would have to go further and establish his own good and better title in order to succeed, and that would not be by proceedings under s: 42 of the Law of Property Act.

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The order made.

The application dated 15th November, 2004, by Mr. Harrison August Sr., for a declaration of title under s: 42 of the Law of Property Act, is dismissed with costs in the sum of \$15,000.00 (fifteen thousand dollars) to be paid to Mr. Oswald Patten, the respondent, by Mr. Harrison August Sr. Both Mr. Harrison August Sr. and Mr. Harrison August Jr. are enjoined to vacate land parcel No. 1560 Tigris Street, Belize City, in (60) sixty days from today. They are not to remove houses No. 27 and No. 29 which are presently on the property. The sum of 15,000 costs is warranted because Mr. Oswald Patten was unnecessarily made to engage senior counsel. Mr. Harrison August Sr. knew that Mr. O. Patten was the paper owner and knew that he, Mr. August Sr., did not live on the land yet he claimed it.

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Delivered this Friday, 23rd day of March 2007.

At the Supreme Court

Belize City

Sam Lungole Awich

Judge

Supreme Court.