

**IN THE SUPREME COURT OF BELIZE, A.D. 2013**

**CLAIM NO. 570 OF 2011**

**BETWEEN:**

**MICHAEL BREWSTER**

**Claimant**

**AND**

**DAISY WATSON  
DANIEL GONGORA  
MANUEL VARGAS  
JESUS VARGAS**

**Defendants**

**In Court.**

**BEFORE: Hon. Chief Justice Kenneth Benjamin.**

November 14, 2012, May 17 and June 7, 2013.

Appearances: Mrs. Peta-Gay Bradley for the Claimant.  
Mr. Anthony Sylvestre for the first and second Defendants.

**JUDGMENT**

[1] The Claimant is the proprietor by a Land Certificate of property comprised of 10.210 acres situate at Unitedville in the Cayo District and more fully described as Parcel 2570, Block 24, in the Society Hall Registration Section of Belize (“the property”).

[2] By a Fixed Date Claim Form filed on September 9, 2011, the Claimant brought proceedings against the Defendants for possession of the property, an injunction

restraining the Defendants from entering upon the property, damages or mesne profits and costs. The facts in support of the Claim were set out in an affidavit sworn to by the Claimant.

[3] The Claimant averred that in the year 1985 he purchased and began occupying the property. Subsequently, in 2000, he sold a portion of the property to the Government of Belize for the installation of the rural water system. In that same year, 2000, a dispute arose between the Claimant and the second Defendant as to the boundary between the property and adjoining property belonging to the mother of the first Defendant. The dispute has since persisted with requests by the Claimant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to remove from the property. A suit was brought by the Claimant against them in the Magistrate's Court but jurisdiction was declined having regard to the dispute.

[4] The allegations of trespass are detailed in the Claimant's first affidavit as follows:

- (a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have refused to remove a house from the land notwithstanding requests by the Claimant to do so;
- (b) On May 5, 2010, the Defendants manually cleared approximately one acre on the south-western portion of the land;
- (c) On October 5, 2010, the Defendants used a bulldozer to clear approximately one acre of the property;
- (d) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have sold portions of the property which the purchasers have been occupying;
- (e) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have posted a 'FOR SALE' sign on the property; and
- (f) On March 19, 2011, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were on the property and an altercation with the Claimant ensued resulting in him being arrested and charged.

Exhibited to the affidavit was a Plan of Survey prepared by H. Alexis Fairweather, a licensed land surveyor, at the request of the Claimant. The said Plan is dated August 9, 2011 and purports to be in respect of Parcel No. 2570, Block No. 2 (sic), Society Hall Registration Section of which of which the Claimant is the proprietor.

[5] The record shows proof by affidavit of the service of the Fixed Date Claim Form on each Defendant. An affidavit sworn to by the 2<sup>nd</sup> Defendant was filed on November 11, 2011. The said affidavit was stated to be in response to that of the Claimant and sworn on behalf of all the Defendants. The Claimant's entitlement to the relief sought in the claim was disputed and the acts of trespass attributed to the Defendants were denied. The survey by Mr. Fairweather was challenged as not being authenticated and thus invalid. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied having sold any portions of the property but they admitted to selling lots owned by the first Defendant.

[6] The affidavit of the 2<sup>nd</sup> Defendant purported to trace the proprietorship of the land owned by the 1<sup>st</sup> Defendant and described as Block 24 Parcel 4019 Society Hall Registration Section as being inherited from her mother, Emeline Watson who was the grantee of Minister's Fiat Grant No. 371 of 1980 dated August 4, 1980 in respect of Lot 4 Block 20 near Mile 62, Western Highway, Unitedville Village, Cayo District. The grant of Probate of the Estate and Will of Emeline Watson appointing the 1<sup>st</sup> Defendant as executrix was referred to in and exhibited to the affidavit. The land comprised of 2.48 acres was asserted as being in the occupation of the 1<sup>st</sup> Defendant and her mother dating back to 1980.

[7] On October 29, 2012, a Second Affidavit was sworn to by the Claimant exhibiting a Land Register Report in respect of Block 24 Parcel 4019 of the Society Hall Registration Section to the effect that the land had been sold by Daisy Watson to one Loren Doyle Armstrong in whose name the land was registered on March 15, 2012.

[8] By Order of Court, Donald McKay, a licensed land surveyor, was commissioned to survey the property comprised in Land Certificate No. 389/2006 in the name of the Claimant and to submit a report to the Court as to any encroachment by fencing or

otherwise. The report dated April 13, 2012 was submitted. The following was stated by Mr. McKay:

“The result from my field survey executed on the abovementioned property revealed the following:

Findings:

1. That the Single Storey Wooden House (5m x 7m) being the residence of Daisy Watson & Daniel Gongora has been erroneously erected within the legal boundaries of parcel 2570 for which Michael Brewster is the registered proprietor.
2. That the excavated area (321.029 sq. m) has been illegally mined from parcel #2570.”

On June 6, 2012, Court visited the locus accompanied by the Claimant and the 1<sup>st</sup> and Second Defendants and their legal representatives. In their presence, Mr. McKay pointed out the survey markers on the ground delineating the property.

[9] With the leave of the Court, learned Counsel for the Defendants put written questions which were responded to by Mr. McKay as follows:

“QUESTIONS

1. Why is a ‘crow foot’ marking on survey markers 6, 5, 4, 3 and 2 and not on A4?
2. Why is the A4 survey marker beneath the surface ground and the other survey markers namely 6, 5, 4, 3 and 2 are protruded above the surface ground?

RESPONSE

- i. Fundamentally, the concrete pillar (Government survey marker designated by a ‘crow foot’) denoted as A4 was found with its TOP

portion broken off; resulting in the obliteration of that portion which would have been so marked with the crow foot.

- ii. The remaining portion of the said marker A4 of which was found below the existing ground level that was built up in the construction of an (sic) drive way.

SIMPLY PUT!! The concrete pillar denoted as A4 got BROKEN and the TOP PORTION was DESTROYED; the REMAINING PORTION remained beneath the ground.”

### EVIDENCE

[10] At the trial, the Claimant and the 1<sup>st</sup> and Second Defendants appeared. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not appear. Both deponents (the Claimant and the 2<sup>nd</sup> Defendant) were cross-examined by opposing Counsel.

[11] The Claimant told the Court that he had bought the property in 1985 from Nivet Austin and Jeanette Austin and a land certificate was issued in his name and the names of his children. Subsequently, he changed his name and title was re-issued to reflect the changes of name. He stated that when he bought the land it was 10.97 acres and after the sale of part of the property to Government, 10.21 acres remained.

[12] The Claimant agreed that shortly after the transaction with the Government, the 2<sup>nd</sup> Defendant placed wooden pegs on his property but these were no longer there. He said that after the sub-division necessitated by the purchase by the Government, a new title was issued reflecting Parcel 2570 while the parcel number of the portion of land sold was 2569.

[13] In relation to the alleged trespass, the Claimant said that he saw Manuel Vargas and his wife, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, clearing the land. Upon confronting them, he was informed that they had bought that portion of land from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and were awaiting the documents. No documentary evidence of such a purchase was provided to the Court.

[14] The second Defendant, Daniel Gongora, was the only witness for the Defendants and he gave testimony on behalf of himself and his wife, Daisy Watson, who is the 1<sup>st</sup> Defendant. His testimony traced his association with the land at Unitedville. He recalled that he was farming at Society Hall before moving to live at Unitedville in 1994 to live. A piece of land was given to the 1<sup>st</sup> Defendant by her mother, Emeline Watson, who, at the time, lived in her own house on the land. That house was then the only house on the land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants built a small house and subsequently Emeline Watson's house became derelict and she moved in with them. Later, the 2<sup>nd</sup> Defendant built a second house which they presently occupy.

[15] The second Defendant at first asserted that the land they occupied comprised about 12 ½ acres. He was adamant that the property was never divided. This assertion is not borne out by the documentary evidence of the subdivision of the property originally registered to Emeline Watson. However, he subsequently admitted that a piece of land was sold to the Vargas by the 1<sup>st</sup> Defendant. He spoke of the sale of one acre to Manuel Vargas and of two acres to one David Cunningham. In response to Counsel, he stated that he was not familiar with the name of Loren Doyle Armstrong.

[16] All in all, the 2<sup>nd</sup> Defendant said that he and the 1<sup>st</sup> Defendant had lived on the land for 19 years. Throughout that time, the Claimant and themselves lived as neighbours to the extent that he gave the claimant cane and cassava as his request.

[17] The 2<sup>nd</sup> Defendant insisted that from the time he went to live on the land, the boundary was located near the water pump. However, it must be noted that the water pump was installed after 1996 subsequent to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants going to live on the land.

#### TRACING OF TITLE

[18] At the instance of the Court, the parties submitted documents tracing the history of their respective parcels of land from the date of the Minister's Fiat Grant to their predecessors-in-title.

[19] The documents submitted by the 1<sup>st</sup> Defendant revealed the following chronology:

- (i) August 4, 1980 – Minister’s Fiat Grant No. 371 of 1980 to Emeline Watson of Lot No. 4 Block No. 20 comprised of 12.115 acres ear Mile 62, Western Highway, Unitedville Village. Plan No. 371 of 1980 reflecting the acreage was attached.
- (ii) August 20, 1997 – First registration in the name of Emeline Watson of Block 24 Parcel 429 Society Hall Registration Section comprised in Land Certificate 4974/97 dated October 7, 1997.
- (iii) July 28, 1999 – Mutation No. 93/99 by Emeline Watson subdividing the land by a plan of sub-division into B(Parcel 2891) comprised of 8.102 acres and A(Parcel 2890) comprised of 4.008 acres.
- (iv) November 11, 1999 – Block 24, Parcel 2891 comprised of 8.102 acres by Land Certificate No. 6871/99 dated November 12, 1999 issued in the name of Emeline Watson.
- (v) November 12, 1999 – Instrument No. 6869 transferring Block 24 Parcel 2890 comprised on 4.008 acres to Alexander Watson pursuant to Transfer of Land dated October 8, 1999 executed by Emeline Watson and Alexander Watson.
- (vi) August 11, 2004 – Transfer to Daisy Watson as executor of the estate of Emeline Watson of Parcel 2891 Block 24 in the Society Hall Registration Section.
- (vii) Mutation No. LRS – 201000248 subdividing Parcel No. 2891 into Parcels 4017, 4018 and 4019.
- (viii) October 3, 2009 – Plan by J. H. Hertular, Licensed Land Surveyor showing sub-division survey of Parcel 2891 Block 24, Society Hall Registration Section creating Parcels 4017, 4018 and 4019.

- (ix) February 16, 2010 – Transfer of Parcel 4018 to David and Lourdes Cunningham comprised of 1.93 acres.
- (x) January 11, 2010 – Land Certificate in the name of Daisy Watson for Parcel 4010 Block 24 in the Society Hall Registration Section comprised of 2.48 hectares
- (xi) March 6, 2012 – Transfer of Land in respect of Parcel 4019 to Loren Doyle Armstrong comprised of 2.48 hectares.

[20] In summary, the land comprised in the Minister's Fiat Grant to Emeline Watson was subdivided into Parcels 2890 and 2891. Parcel 2890 was transferred to Alexander Watson. Parcel 2891 which bordered Parcel 2570, was further sub-divided into Parcels 4017, 4018 and 4019 which were registered in the names of Daisy Watson, David & Lourdes Cunningham and Loren Doyle Armstrong respectively.

[21] The documents pertaining to the Claimant's property originated from Minister's Fiat Grant No. 85 of 1975 dated February 26, 1975 in the name of Nivet Austin in respect of Lot 1, No. 1, Block No. 20 in Unitedville Village, Cayo District comprised of 10.202 acres. The Plan No. 85 of 1975 dated February 26, 1975 by James Hyde showed the said property as bordering a lot numbered 4.

[22] The property was conveyed on December 20, 1979 into the joint names of Nivet Austin and Jeanette Austin and First Registration was applied for Land Certificate No. 1880/85 was issued on September 3, 1985.

[23] On August 8, 1985 Nivet and Jeanette Austin executed a transfer of the property to Michael Brewster, Snr. and Michael Brewster, Snr. in trust for three named persons jointly.

[24] There followed a change of name of Michael Brewster to Olatunji which resulted in the rectification of name in a new Land Certificate No. 831/92 comprising 10.297 acres in respect of Block 24 Parcel 427.

[25] On February 14, 1996, by a Mutation, Parcel 427 was subdivided into Parcel 2569 comprised of 0.082 acres and Parcel No. 2570 comprised of 10.212 acres. As a result, by Instrument No. 6098/96 dated December 31, 1996, Parcel No, 2569 of Block 24 was transferred to the Government of Belize. By Instrument No. 11161/2004, Parcel 2570 Block 24 in the Society Hall Registration Section was registered in the name of Olatunji.

[26] The most recent document of title in the name of Michael Brewster is Land Certificate No. 389/2006 dated January 18 2006 in respect of the said Parcel 2570 Block 24 comprised of 10.210 acres.

#### SUBMISSIONS BY THE CLAIMANT

[27] The Claimant presented written submissions and made oral submissions in person. He pointed out that since the year 2000 when the dispute arose, the 1<sup>st</sup> named Defendant has caused her property to be sub-divided, acts which involved land surveyors. It was asserted that since the Defendants had not presented any expert evidence from a land surveyor, the Court is obliged to accept the unchallenged evidence of the court-appointed land surveyor, Mr. Donald McKay.

[28] The Claimant contended that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had not defended the Claim and that indeed the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had not submitted any affidavit or testified in Court. He disputed the right of the 2<sup>nd</sup> Defendant to purport to represent the 1<sup>st</sup> Defendant in the absence of a power of attorney. It must at once be pointed out that the 1<sup>st</sup> Defendant is a party in his own right and is permitted to testify as to matters within his own knowledge and such matters can be applied in respect of the defence of all the defendants as part of the entire case. With all due respect to the Claimant, there is no issue of hearsay regarding the evidence of the 2<sup>nd</sup> Defendant. Indeed, the 2<sup>nd</sup> Defendant was stated to be authorized to swear the affidavit on behalf of all the Defendants.

## SUBMISSIONS ON BEHALF OF 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS

[29] Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants disputed that there has been any encroachment on the Claimant's property. The averment by the Claimant that land had been sold by the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was also challenged. This latter challenge ran counter to what the 2<sup>nd</sup> Defendant stated in his oral testimony; however, it is undisputed, by reference to the documentary material, that there was no sale of land to the Vargas. This misconception had its origin in what the Claimant said he was told by 3<sup>rd</sup> and 4<sup>th</sup> Defendants. No further attention need be given to this issue.

[30] The main thrust of the submissions by learned Counsel was grounded on the arithmetical fact that whereas the Minister's Fiat Grant to Emeline Watson referred to land comprised of 12.115 acres as did Instrument No. 4278/97 dated August 20, 1997, when the subdivision by way of mutation was done the total acreage amounted to 12.110 acres reflecting a loss of 0.005 acres. It was contended that any perceived trespass was a result of surveying errors by the Lands Department. In further support of his contention Learned Counsel referred to the original plan No. 82 of 1975 attached to the Minister's Fiat Grant to Nivet Austin which recorded 10.292 acres whereas Land Certificate No 831/92 in the name of Olatunji states the area as 10.297 acres.

[31] Learned Counsel further pointed to the evidence of the 2<sup>nd</sup> Defendant that the house he resides in with the 1<sup>st</sup> Defendant has stood there since 1994. The Court was asked to treat as significant the fact that the dispute arose around the time when the land was sold by the Claimant to the Government of Belize. Further, the Court was asked to treat the report of Donald McKay as unreliable as to the area of the land belonging to the Claimant.

## FINDINGS

[32] The issue for the determination of the Court is a factual one. Simply put, the Court is being called upon to decide whether the house occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the portion of property allegedly cleared by the Defendants are situated within the boundaries of the property registered in the name of the Claimant. Following

upon this, a finding is to be made to whether the cause of action of trespass to land has been proved by the Claimant.

[33] The evidence disclosed that the original owners of the parcels of land involved in this case occupied Lot 1 and Lot 4, which are in boundary with each other. In this regard, the evidence in the report of Court-appointed expert in the person of licensed land surveyor, Donald McKay, assumed importance. Having conducted a re-survey of Parcel 2570 Block 24 in the Unitedville Society Hall Registration Section, Cayo District, the expert's report concluded that the house occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lies within the boundaries of the said Parcel 2570. It was also stated in the report that the excavated area referred to in para. 14 of the Claimant's affidavit also fell within the said boundaries.

[34] The Court has considered the submission of the Defendant's Counsel as to the shortfall in acreage reflected on the face of the documents. However, no attempt was made to put formal questions to the Surveyor to address this matter. A fortiori, no attempt was made to seek the permission of the Court to proffer expert evidence to address the apparent discrepancy in acreage. The net result is that there is no evidence to explain this disparity appearing on the face of the documents one way or the other. Accordingly, the Court is constrained to accept the expert evidence of Donald McKay as conclusive of the situation of the house and the location of the excavated area.

[35] The evidence of the Claimant stands uncontroverted as to the Defendants having brought a bulldozer on October 10, 2010. However, the affidavit of the Defendants denied manually clearing one acre of land on the south-western portion of the Defendant's property. This was never challenged in cross-examination by Counsel for the Claimant. There is therefore evidence of trespass by the use of the bulldozer. No proof of any loss was adduced by the Claimant who is therefore only entitled to nominal damages.

[36] In the premises, it is ordered as follows:

- (1) The 1<sup>st</sup> and 2<sup>nd</sup> named Defendants shall deliver up possession of the portion of land occupied by them forming part of Parcel No. 2570 Block 24 Society Hall Registration Section.
- (2) The Defendants, whether by themselves, their servants and/or agents or howsoever otherwise are restrained from entering upon the said parcel 2570.
- (3) The Defendants shall pay to the Claimant damages in the sum of \$1,000.00.
- (4) The Defendants shall pay to the Claimant costs fixed in the sum of \$5,000.00.

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**KENNETH A. BENJAMIN**  
**Chief Justice**