COLE *v.* CUMMINGS, CUMMINGS and CUMMINGS (No. 2)

COURT OF APPEAL (Ames, P., Dove-Edwin, J.A. and Cole, J.): October 30th, 1964
(Civil App. No. 4/64)

[1] Civil Procedure—judgments and orders—declaration of title to land—declaration for part of land claimed: In a proper case there may be a declaratory judgment as to title to land limited to part of the land referred to in the writ or described in the pleadings (page 168, lines 13–23).

[2] Civil Procedure—judgments and orders—declaration of title to land—judgment should incorporate plan: A declaratory judgment about the ownership of land should incorporate a plan of the land (page 168, lines 7–10).

[3] Civil Procedure—notices concerning documentary evidence—registered instrument—register copy not receivable in evidence unless General Registration Act (cap. 255), ss.18 and 19 complied with: The copy kept by the Registrar General of a registered instrument cannot be put in evidence unless the General Registration Act (*cap.* 255), ss.18 and 19 (regarding notice of intention to use the document in evidence), have been properly complied with (page 169, lines 1–9).

[4] Civil Procedure—pleading—declaration of title to land—plan may be put in evidence though not mentioned in pleadings: In an action where title to land is in issue, a party may put in evidence a plan of the land he claims though he has not mentioned the plan in his pleadings (page 168, lines 24–29; 37).

[5] Evidence — hearsay — Evidence (Documentary) Act (cap. 26) — surveyor's plan prepared for party—surveyor not a person interested within s.3(3) of Act: A surveyor who gives evidence for a party to an action in which title to land is in issue and puts in evidence a plan of the land the party claims, prepared after the action was brought from a sketch made by the surveyor before the action was brought, is not a "person interested" within the meaning of s.3 of the Evidence (Documentary) Act (*cap.* 26) (page 168, lines 24–40).

[6] Evidence—plans—declaration of title to land—plan of land may be put in evidence though not mentioned in pleadings: See [4] above.

[7] Evidence—plans—surveyor's plan prepared for party—surveyor not "person interested" within Evidence (Documentary) Act (cap. 26), s.3(3): See [5] above.

[8] Evidence—registered instrument—register copy not receivable unless General Registration Act (cap. 255), ss.18 and 19 complied with: See [3] above.

[9] **Land Law—land registration—registered instruments—register copy not receivable in evidence unless General Registration Act (cap. 255), ss.18 and 19 complied with:** See [3] above.

[10] **Land Law—title—declaratory action—declaration for part of land claimed:** See [1] above.

[11] **Land Law — title — declaratory action — judgment should incorporate plan:** See [2] above.

The appellant brought an action in the Supreme Court against the respondents for a declaration of title to land, injunctions and damages for trespass. The respondents counterclaimed for a declaration of title to the same land, an injunction and damages for trespass.

At the outset of the hearing the plaintiff obtained leave to discontinue his action. The respondents proceeded with their counterclaim. One of their witnesses was a surveyor who put in evidence a rough unsigned sketch of part of the land, made by him before the action started, and a plan made during the action, which was a fair copy of the sketch. Neither was mentioned in the pleadings. The surveyor demonstrated that his plan was a plan of part of the land described in the statement of claim. The respondents could not prove their case as to the whole of the land in dispute. They were refused leave to amend their defence and counterclaim to make them accord with the evidence.

The appellant sought to prove a registered conveyance by putting in evidence the copy which was in the register of instruments. He had not properly complied with the requirements of ss.18 and 19 of the General Registration Act (*cap.* 255) and the copy was rejected.

The Supreme Court gave judgment for the respondents in respect of part of the land in dispute. On appeal, the appellant contended that the respondents could not have judgment for an area of land not described in the pleadings; that the sketch and plan prepared by the respondent's surveyor were wrongly received in evidence because they contravened s.3 of the Evidence (Documentary) Act (*cap.* 26); and that the copy of the registered conveyance which he had sought to put in evidence had been wrongly rejected. The appellant also contended that the judgment was against the weight of evidence.

Case referred to:

(1) *Okon Owon* v. *Eto Ndon* (1946), 12 W.A.C.A. 71, followed.

Statutes construed:

Evidence (Documentary) Act (Laws of Sierra Leone, 1960, *cap.* 26), s.3(1):
"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible in evidence of that fact if the following conditions are satisfied, that is to say—
(i) if the maker of the statement either—
(a) had personal knowledge of the matters dealt with by the statement; or
. . . and
(ii) if the maker of the statement is called as a witness in the proceedings. . . ."

s.3(3) "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any facts which the statement might tend to establish."

s.3(4): "For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

General Registration Act (Laws of Sierra Leone, 1960, *cap.* 255), s.17:
"Every certified copy made under the provisions of this or any Act, purporting to be signed by the Registrar General . . . shall be receivable in evidence in all civil cases instead of the original thereof. . . ."

s.18: "Any person intending to use such certified copy in a civil case before a Court shall give notice to the opposite party, his attorney or agent, of such intention, and with such notice shall deliver a copy of the certified copy, and on proof of service and receipt of the copy, or admission of the receipt of such notice and copy, such certified copy shall be received in evidence at the trial, if the Court shall be of opinion that such service has been made in sufficient time before the trial to enable the opposite party to examine the original of the certified copy."

s.19: "Any party intending to use in evidence in any civil or criminal trial any original instrument, record, register or document deposited with the Registrar General or Registrar, or any officer of the Registrar General's department, instead of a certified copy, shall nevertheless give to the opposite party within a reasonable time of the trial notice of such intention and deliver to such party a copy of the entry or extract which he intends to use."

Registration of Instruments Act (Laws of Sierra Leone, 1960, *cap.* 256), s.20:

"(3) Any person desiring that any instrument shall be registered shall deliver the same together with a true copy thereof . . . to the Registrar General.

. . . .

(6) . . . the Registrar General shall compare the copy of the instrument with the original and if he shall find such copy to be a true copy and to comply with this Act he shall certify the same by writing thereon the words 'certified true copy' and appending his signature thereto.

(7) The Registrar General shall thereupon register the instrument by causing the copy so certified to be pasted or bound in one of the prescribed registers and by endorsing on the original instrument a certificate in the form 'E' in the First Schedule. . . ."

McCormack for the appellants;
E. L. Luke for the respondents.

AMES, P.:

The appellant issued a writ against the respondents claiming a declaration of title to land, injunctions and damages for trespass. The land was 48.67 acres in extent and was described in detail in para. 6 of the statement of claim, with beacon numbers, bearings and distances around its boundaries and by reference to a plan, *i.e.*, ". . . . as shown delineated in the plan numbered LVM/C.240/61."

A defence was filed in which it was pleaded that the respondents were in possession "of the said piece of land referred to in para. 6 of the statement of claim" and that they were the lawful owners thereof "in fee simple absolute and have been in undisturbed possession thereof for a period of over 30 years"; they counterclaimed for a declaration of title to the same piece of land, an injunction and damages for trespass.

At the outset of the hearing the appellant applied for, and was given, leave to discontinue his action and it was ordered that the respondents should prosecute their counterclaim. From what was said by counsel for the appellant to us at the hearing of the appeal, the discontinuance was a tactical move, the appellant thinking that he would benefit more by securing the dismissal of the respondents' counterclaim.

It was not, however, dismissed. They obtained a declaration, an injunction and damages for trespass to part of the land referred to in the statement of claim and in the defence and counterclaim. The evidence showed that its area was 34.38 acres. A plan was

put in evidence by the respondents. It was, of course, not the plan LVM/C.240/61 mentioned in the statement of claim. The declaratory judgment was merely for "35 acres at Fonunia and described as bounded on the north by property of Pa Thompson 2,598 ft.; south by property of Ambrose Davies 2,083 ft.; east by Forest Reserve 870 ft.; and west by Probyn road 1,168 ft."

With all respect to the learned judge, my experience in other parts of West Africa is that declaratory judgments about ownership of land are not likely to make a lasting settlement of a dispute unless they incorporate plans.

Against that judgment this appeal has been made. There are several grounds of appeal. I need not set them out in full.

During the case for the respondents it became apparent that they could not prove their case as to more than 34.38 acres of the 48.67 acres in para. 6 of the statement of claim. They sought to amend their defence and counterclaim to make it accord with the evidence that their land was 34.38 acres. Objection was made and the amendment was not allowed. So in the result they obtained a declaration as to an area not detailed in the pleadings. The first ground of appeal complains of that. It has been held in *Okon Owon* v. *Eto Ndon* (1) and in other cases, and may be taken to be settled, I think, that in a proper case a plaintiff can obtain a declaratory judgment limited to part of the area referred to in his writ.

I have said a plan was put in evidence and so was what the surveyor called a "rough sketch." Both were objected to but the objections were overruled and both were put in evidence. A ground of appeal is that they were wrongly admitted in evidence and the argument against them before us was that they were not mentioned in the pleadings; that the rough sketch was not signed; that the plan was made after the action started; and that they contravened s.3 of the Evidence (Documentary) Act (*cap.* 26). Both were put in evidence by the surveyor himself. The rough sketch was made by him before the action; the plan was a fair copy made during the action. The surveyor related it to the appellant's plan which he had inspected in the registry and superimposed the latter on it, thus showing how it was part of the land in para. 6 of the statement of claim and what part it was. In my opinion these were properly put in evidence, and I do not agree with the argument based on s.3 of the Evidence (Documentary) Act (*cap.* 26). I would not think that the surveyor was an interested party within the meaning of the section. I think that the plan could well have been incorporated in the judgment.

The appellant sought to put in evidence the copy of a registered conveyance dated December 11th, 1961, which was in the register of instruments according to s.20(7) of the Registration of Instruments Act (*cap.* 256) and the Deputy Registrar General was in the witness box to produce it. It was objected to and the objection was upheld. This was the basis of another ground of appeal. In my opinion it was rightly refused. The requirements of ss.18 and 19 of the General Registration Act (*cap.* 255) had not been properly complied with.

The other grounds of appeal were concerned with the weight of evidence. The evidence supported the judgment.

I would dismiss the appeal.

DOVE-EDWIN, J.A. and COLE, J. concurred.

Appeal dismissed.

DAVIES *v.* COKER

SUPREME COURT (Marke, J.): November 4th, 1964
(Misc. App. No. 34/64)

[1] Civil Procedure—appeals—time for appeal—leave to appeal out of time—defendant not notified of hearing—defendant's counsel, informed case listed, leaves court—extension of time refused: Leave to appeal out of time will not be granted on the ground that the defendant had no notice of the hearing, if his counsel was in court on the hearing day and was informed that the case was on the hearing list but left without asking for an adjournment (page 170, lines 26–33; page 171, lines 11–12).

[2] Legal Profession—appearance in court—unreasonable failure to notify court that notice of hearing not received—no ground for extension of time for appeal: See [1] above.

The applicant applied for leave to appeal out of time.

The date of hearing of a case between the applicant and the respondent was changed and the applicant did not receive notice of the new date arranged. On the day in question the applicant and his counsel happened to be in court and the counsel was informed that the case was on the hearing list, but as he had business elsewhere