Civ. App. 11/2002

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

1. LUCY DECKER
2. GISBORNE DECKER (jnr)
3. OLIVE DECKER
4. GERSHON DECKER

- APPELLANTS

AND

GOLDSTONE E. DECKER - RESPONDENT

CORAM:

HON MR JUSTICE E. C. THOMPSON-DAVIES J.S.C.
HON MR JUSTICE A.N.B. STRONGE J.A.
HON MR JUSTICE G. GELAGA KING J.A.

A.M. Sesay, Esq., for the appellants
A.Y. Brewah, Esq., for the respondent

JUDGEMENT DELIVERED ON THE 21st DAY OF ~~MAY~~ 24th June, 2003

HON MR JUSTICE G. GELAGA KING, J.A.: James Elkanah Decker was the father of the brothers Goldstone Decker, the respondent, and Gisborne Beresford Decker, now deceased, who was the husband of Lucy Decker, the first appellant. James Elkanah died on the 9th day of February 1976 and the son Gisborne on the 11th May 1995. Gisborne Decker, Olive Decker and Gershon Decker, the second, third and fourth appellants, respectively, are the children of the first appellant and the deceased Gisborne Beresford Decker, and the nephews and niece of the respondent.

The brother-in-law and uncle, the respondent, instituted action in the High Court against his sister-in-law, the 1st appellant and his said nephews and niece. He claimed that he is the owner and entitled to possession of premises situate at 21, Old Railway Line, Brookfields, by virtue of a deed of gift from his father and also by a devise in the father's will dated 15th November, 1975. He averred that on or about May 1990 he let part of the premises consisting of a dwelling house at a rent of Le10,000 per month to his brother and his family who then entered into possession. According to him, his brother paid the rent for the first two months and then stopped, pleading impecuniousity. He further alleged that by letter dated 7th March 1995 he terminated the tenancy, but his brother and family

refused to quit. He sought a declaration from the court that he owned the said property and asked for immediate possession.

The appellants in their defence and counterclaim denied that the respondent is owner or that he was entitled to possession of the said property, alleging that the said deed of gift "was procured by fraud or undue influence." They averred that they never paid any rent to the respondent on the ground that the property belonged to their husband/father and that the respondent was not legally entitled to give them notice to quit. They pleaded that the respondent "unscrupulously got his father who was seriously ill and confined to his bed and out of his mind to execute two deeds of gift. . .and a Will dated 15th November, 1975..." Furthermore, they allege, the respondent begged his brother to move to the premises and "promised to execute the documents transferring ownership of the property to him." According to them, they had "incurred a lot of expenses in repairing the premises, erecting three kitchens, a toilet and a shop" and they say the respondent was estopped from going back on his promise. They say they are legally entitled to the property and asked for a perpetual injunction against the respondent, "restraining him from interfering with the defendant's use and enjoyment of the property...or from collecting rents from the said property."

Issue was joined and the case was eventually heard before L.A.E. Marcus-Jones, J. She gave judgement for the respondent and declared that the land and hereditaments situate at 21, Old Railway Line, Freetown belongs to and is owned by the plaintiff. She dismissed the counterclaim, awarding costs, to be taxed, to the respondent. She refused a stay of execution, but on renewing the application in this Court we stayed execution having regard to the special circumstances of the case.

It is against the judgement that the appellants have appealed to this Court on the following three grounds: -

1. The decision is against the weight of the evidence.
2. The learned trial judge applied the wrong principles of law in arriving at her decision.
3. The learned trial judge erred in law in holding that notwithstanding huge expenses incurred by the defendants in rehabilitating premises situate at 21, Old Railway Line, Freetown for absence of a document in favour of the plaintiff's deceased's brother disentitled the defendants to lay claim to the property situate at 21, Old Railway Line Brookfields, Freetown."

PARTICULARS OF ERROR

It is unfortunate for defendants that plaintiff never made any document in favour of his brother now deceased. I opine that defendants are not empowered to lay claim to the property. Accordingly I dismiss the counterclaim."

Ground 2 can be dealt with in a short shrift. Rule 9 (2) of this Court's rules, P.N. 29 of 1985, stipulates explicitly that if a ground of appeal alleges misdirection or error in law, "particulars of such misdirection or error shall be clearly stated." That rule is mandatory. As no particulars were given for ground 2, it automatically fails.

In arguing ground 1, the appellants submitted that the will of the testator, ex. "B" seeks to confirm the deed of gift, ex. "A", in respect of the property known as 21, Old Railway Line, when in fact at the material time when ex "B" was prepared, ex. "A" was not in existence, nor could it have been duly registered. Mr Sesay, for the appellants, submitted that ex. "A" was not in existence because ex. "A" is dated 17th November 1975 while ex. "B" is dated 15th November 1975. He submitted that it was the respondent who made exhibits "A" and "B". These are exceedingly serious allegations, imputing fraud and other serious criminal offences, such as forgery, on the respondent

As I pointed out earlier, the appellants in their defence allege that the deed of gift, exhibit "A' was procured by fraud or undue influence. (See paragraph 1 of the defence). No particulars of fraud or undue influence were stated, in clear contravention of the mandatory provision of O. XVI r. 6 of the High Court Rules. The rule states:

> "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or **undue influence,** and in all other cases in which particulars may be necessary, **particulars (with dates and items if necessary) shall be stated in the pleading. . .**" Emphasis mine.

The acts alleged to be fraudulent must be stated in the particulars, otherwise no evidence in support of them will be received. Vide **Smith v. Chadwick 9 App. Cas. 187.** That apart, I must here emphasize that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from conduct: **Davey v. Garrett 7 Ch. D. 489**. It is unacceptable and improper for counsel for the appellant to stand at the bar, and infer fraudulent conduct on the part of the respondent by saying the respondent made the will, as if this were a probate action in which opposition was being made to a grant of probate.

As was stated in **Wallingford v. Mutual Society 5 App. Cas. 697:**

> "General allegations, however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any court ought to take notice."

I endorse that dictum and I do not hesitate to apply it in this case and say that I will not take any notice of counsel's allegation that the respondent made the will, ex. "B". Nowhere in the record is it shown that there was a report made to the police that the respondent had made or forged his father's will, or that the respondent had been charged and convicted for such or similar crimes.

I similarly reject the brazen and scandalous assertion by appellant's counsel that the respondent made the deed of gift, ex. "A". If the appellants suspect, because of the reasons they have given, that it is a forgery, then they should know what steps to take to bring the alleged perpetrator to justice. In my judgement, they are ill advised to make the scurrilous allegations they have made in a claim for declaration of ownership and possession.

Let me here stress the basic and fundamental principle that the issues that the High court was called upon to adjudicate on were decided by the pleadings. It is opportune to remind legal practitioners that the function of pleadings is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. Vide Lord Radcliffe's speech in Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218, 241. Parties ought not and must not be allowed to go outside their pleadings.

If the appellants think that the testator was of unsound mind, or that the execution of the will was obtained by undue influence, or that a clause in the will was introduced by fraud or forgery, as next-of-kin they are at liberty to institute proceedings to have the will proved in solemn form, when they would then have the opportunity to oppose a grant of probate on those grounds.

I agree with the learned judge's finding of fact when she says: "On all the evidence before the court it is clear that no action was brought in court at any time by plaintiff's brother, Gisborne Decker, questioning the testamentary dispositions of their father James Elkanah Decker. Under cross-examination, D.W. 1 said: 'I have no document to show premises is property of my deceased husband."

The judge in meticulously evaluating the evidence specifically referred to the evidence of D.W. 2, the third appellant. Let me reproduce what the learned judge said at page 57 of the record:
'With regard to how the defendants came to be in the premises, D.W. 2 said Gisborne Decker's family were allowed to occupy a portion of 21, Old Railway Line. 'When we went to premises, other people were paying rent to the plaintiff.' This defendant also tells of plaintiff's move to get them out of the premises. She said, 'I referred to previous case between my family and plaintiff. Case was for our removal from 21, Old Railway Line. It was while case was pending that father died.' Interestingly, this defendant went on to testify that "father was 1st defendant in that case".

All these findings go to show that the respondent regarded the appellants as his tenants and even started proceedings in court to evict them after he had given them notice to quit. The appellants denied in their defence and in evidence that

they paid any rent to the respondent. But the respondent, who was P.W.2 in the court below, swore that his brother, head of the defendants' household, was paying rent to him and he tendered the duplicate receipt book, ex. "C". That exhibit contained duplicate receipts for rent for May 1987 for rent paid by Mr G.B. Decker and for June 1987 given to Mrs Decker, 1st defendant.

Amazingly and incredibly, when the appeal was being argued in this Court, we discovered that ex. "C" was missing. Ex "D' the deed of gift, dated 18th September 1975,g had mysteriously become ex. "C" and to make confusion and mystery more confounded and more mysterious, two receipts had become exhibits "D1 &2". It was only when we threatened to call in the police, while calling on the Master & Registrar to investigate, that the court clerk who had custody of the exhibits at the material time came before us to testify on oath that he had found the real ex. "C" under an iron basket where he had inadvertently dropped it. All I will say here is that the facts speak for themselves! At least the crucial and vital duplicate receipt book has been found and has resurfaced two years after it disappeared by falling under an iron basket!

The production of the duplicate receipt book reveals that rent was paid for the premises at 21 Old Railway Line, Brookfields by the respondent's brother to the respondent and receipt for rent was given by the respondent to the first appellant. In the circumstances, it does not lie in the lips of the appellants who are tenants to deny the title of the respondent who is their landlord. It is one of the first principles of the law of estoppel, as applied to the relations between landlord and tenant, that a tenant is estopped from disputing the title of the landlord: Cooper v. Blandy (1834) 1 Bing N.C. 45. It is also trite law that every person who comes in under another, whether as tenant, licensee or otherwise is estopped from denying the title of the person under whom he enters: Doe d. Bailey v. Foster (1846) 3 C.B. 215, 228.

I have already referred to specific findings of fact by the learned trial judge. She went on to opine that the appellants were not empowered to lay claim to the property and accordingly she dismissed the counterclaim. In other words, the learned trial judge rejected the plea of estoppel by the appellants and preferred the evidence of the respondent and his witnesses to that of the appellants and their witnesses. The decision in this case revolved on questions of fact, which the judge resolved in favour of the respondent. In accepting the findings of fact by the learned trial judge I have been guided by the dictum of Lord Shaw in Clarke v. Edinburgh & Dist. Tramways Co. Ltd 1919 S.C. (H.L.) 35, 37. He said:

> "In my opinion, the duty of an appellate court in these circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages , sometimes broad and sometimes subtle, which are the' privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a

> clear conclusion that the judge who heard them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgement."

In Yuill v. Yuill [1945] 1 All E.R. 183 at 188 Lord Greene, M.R. said

> "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion."

I certainly do not regard the instant case as one of those rare occasions. In the circumstances, I am unable to overturn the findings of fact of the learned trial judge. In my opinion, there was ample evidence upon which she could properly come to the conclusions she did. The grounds of appeal are untenable and misconceived. I would dismiss the appeal, with costs jointly and severally against the appellants, such costs to be taxed.

Hon Mr Justice G. Gelaga King, J.A.

I agree

Hon Mr Justice E.C. Thompson-Davies, J.S.C.

I agree

Hon Mr Justice A.B.N. Stronge, J.A.