

CIV. APP. 72/2005

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ALHAJI UNISA ALIM SESAY

APPELLANT

AND

ANTHONY KAMARA

RESPONDENT

CORAM:

Hon Justice U.H. Tejan-Jalloh JSC

Hon Justice S. Koroma JA

Hon Justice A.N.B. Stronge JA

Hearing Date: 24th October, 2006

Judgment: 15th March, 2006

Advocates:

M.E. Michael Esq., for Appellant

D.S. Vincent, Esq., for Respondent

JUDGMENT

Delivered this 15th day of March, 2007.

TEJAN-JALLOH JSC: This is an appeal against the Judgment of Hon. Justice A.B. Raschid delivered on the 23rd day of November 2005 in which the learned Judge made the following Orders against the Appellant:

- (a) A declaration that plaintiff is the Lessee and entitled to possession of all that Piece or Parcel of land situate lying and being at off Ross Road, Cline Town, CT1 Freetown in the Western Area of Sierra Leone. Damages for trespass assessed at Le.1,000,000 (One Million Leones).
- (b) General damages, assessed at Le.1,000,000 (One Million Leones).

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- (c) An injunction restraining the defendant either by, himself, his servant, agent privies or otherwise howsoever from entering upon or otherwise, leased with the Plaintiff's land.
- (d) Costs to be borne by Defendant. Such costs to be taxed.

The appellant dissatisfied with the decision/Order contained in the said Judgment of the 23rd day of November 2005 appealed to the Court of Appeal upon the ground set below:

1. That the Learned Trial Judge erred in law in adducing further evidence from D.W.2 DONALD MORRIS JONES on 21st June 2005 after the parties had closed their case, after the Defendant's Solicitor had addressed the Court and in the middle of the address by the Plaintiff's Solicitor.
2. That the Learned Trial Judge erred in law in continuing to hear the address of the Plaintiff's Solicitor following the further evidence of DW 2 and not affording the Defendant's Solicitor the opportunity to address him further following the further evidence of DW 2.
3. That the Learned Trial Judge erred in recalling DW 2 to further testify in this action at this stage of the proceedings.
4. That the Learned Trial Judge erred in examining DW 2.
5. That the Learned Trial Judge erred in failing to allow Counsel for the Defendant to address the Court on his objection to the recall of DW 2.
6. That the Learned Trial Judge failed to consider or to adequately consider the documentary evidence adduced on behalf of the Appellant.

7. That the Learned Trial Judge misunderstood and consequently misconstrued the evidence of DW 2.
8. That the Learned Trial Judge erred in law and in fact in holding that the Respondent's (Plaintiff's) purported lease for three years had to be revoked before it could come to an end Exh. O
9. That the Learned Trial Judge failed to consider at all or to adequately consider that the issue that the Respondent's lease had been determined by effluxion of time.
10. The judgment is against the weight of the evidence.

Background

By a Writ of summons dated 7th December 2000, the Plaintiff (Respondent herein) instituted an action claiming inter alia a declaration that the Respondent is the owner and entitled to possession of that piece or parcel of land situate lying and being at Off Ross Road, Cline Town, Freetown; damages to trespass; damages for trespass to goods on the said land.

In his particulars of claim, the Respondent alleged that he is the owner and occupier entitled to possession of the said land; that he became entitled to the same by virtue of a lease from Government of Sierra Leone contained in letters dated 20th March 1996 and 19th July 1999.

An appearance was entered on behalf of the Appellant defendant dated 22nd December 2000 and a defence filed dated 4th January 2001. The Appellant denied inter alia the Respondent's assertions and avers that if the Respondent had a lease in respect of the said land the same had expired by effluxion of time. The Defendant denied that he had ever made any personal claims to the said land. He averred that by letters dated 22nd and 23rd September 1999 a portion of land situate Off Ross Road, Cline Town, Freetown was approximately 0.4477 acre in area was leased by the State to East End Lions

At the trial, the Respondent/Plaintiff and 2 other witnesses testified on his behalf. The Appellant/Defendant and Donald Morris Jones, the Acting Director of Surveys and Lands, testified on behalf of the Defence.

Learned Counsel for the Appellant addressed the Court on 23rd May 2005 (page 56 – 59 of the records). On 7th June 2005, the Respondent's Counsel commenced his address (pages 59 – 61). In the middle of his address the learned trial judge on his own volition orders that a subpoena be sent to DW 2 Donald Morris Jones, the Acting Director of Surveys and Lands. The Learned Trial Judge then examined the witness. The witness was cross-examined by Counsel for the Plaintiff/Respondent after which he proceeded to address the court.

Judgment was delivered in this action on 23rd November 2005. It is against this Judgment that Counsel appealed. As regards these grounds of appeal we find it convenient to deal with them together.

From the defence filed the Defendant/Appellant made it abundantly clear that he had never made any personal claims to the said land in dispute and that he only acted as the Chairman of the East End Lions Football Club, on whose behalf he acted, but yet he was sued personally when it should have been a representative capacity. Having made this disclosure, he ought to have been sued in a representative capacity and a representative capacity in which he had been sued must be indorsed on the writ before it is issued. See Ord. 6 r. 3 and should also be stated in the title of the action:

Re Tottenham (1896) 1 ch.628. The endorsement of the representative capacity is a very crucial matter:

Bowler v Johnson Mowlem..... & Co. (1954) 2 All E.R. 556 CA.

2. During the cause of the trial the learned Trial Judge recalled DW.2, Donald Morris Jones in spite of the objection raised by the Appellants Solicitor. In a civil suit the function of the Court is to decide cases on evidence that the parties think fit to call before it. It is not inquisitorial.

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Re Enoch v Zaretsky, Buck & Co. (1910) 1 KB 327.

The Judge has power to recall a witness only if neither party object. See Harlbury's Laws of England 3rd ed.; para 804 at page 445 where the learned author states that with consent of the parties or in the absence of objection, the judge may at anytime recall a witness who has already given evidence. The learned Judge erred in law when he recalled DW 2.

3. The records demonstrated that the appellant was denied a proper opportunity of putting his defence in that following the recall of D.W.2 the appellant's solicitor filed a motion with an affidavit dated 27th June 2005 praying inter alia, leave to appeal against the recall of D.W.2; stay of proceedings pending the hearing and determination of the appeal. The application was never heard.

4. It is abundantly clear in the records that it is erroneous to say that the action is a claim of title to land, because the title to the land vested in the state. This can only be a case of encroachment or trespass to land. The several exhibits tendered reveal that the land leased to the Respondent as per Exhibit C is situated at Off Ross Road, Cline Town, whereas the lease to East End Lions Football Club, is land at CT1 Ross Road, Cline Town Compound, Cline Town, Freetown. See Exh. J.

It is not in dispute that both parties derived their title from the state. Exh. O which emanated from Lessor has expressly stated that "as far as their records are concerned only the East End Lions Football Club are the legal Lessee of the land in question and that only they are entitled to physical occupation thereof.

Finally it is wrong to give judgment for possession of land personally against a person who is not laying any claim to it and who does not possess or occupy it personally.

In this case, the party against whom order or judgment should be directed was not a party to the action. For all the foregoing reasons this appeal is allowed, the judgment

delivered on the 23rd day of November, 2005 is set aside. Costs in this Court (Court of Appeal) and the lower court to be taxed and paid to the appellant.

Hon Justice U.H. Tejan-Jalloh JSC



Hon Justice: S. Koroma JA.....



Hon Justice: A.N.B. Stronge JA ...A.B.

