

CIV APP 47/2006

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: MOHAMED BORBOR BAH - APPELLANT  
AND  
MOHAMED BAH - RESPONDENT

CORAM

HON. MS. JUSTICE S. KOROMA J.SC

HON. MR. JUSTICE P.O. HAMILTON J.S.C

HON MR JUSTICE A.B.N. STRONGE J.A.

R. JOHNSON ESQ. FOR THE APPELLANT

A.E. MANLY SPAINE ESQ. FOR THE RESPONDENT

JUDGEMENT DELIVERED ON THE 19<sup>th</sup> DAY OF MARCH, 2009

KOROMA J.S.C - This is an appeal against the judgement of the Honourable  
Lynton B.O. Nylander J. dated 11<sup>th</sup> May 2006 in favour of  
the Plaintiff, Mohamed Borbor Bah, the Respondent in this  
Appeal.

Briefly, the facts of the case are that the Appellant Mohamed Borbor Bah, the Defendant in the High Court, and the Respondent are both laying claim to what appears to be the same piece of land at Old Peninsular Road Goderich. The Respondent has alleged that the Appellant constructed a fence around a portion of his land on which he had erected a foundation. The Appellant's position is that the fence was erected on land he owned and that the land is different from the Respondent's land.

The Respondent's claim against the Appellant as contained in the Statement of Claim were:

1. Damages for trespass of all that parcel of land at Old Peninsula Road Goderich in the Western Area of Sierra Leone.
2. Injunction restraining the Defendant by himself, his servants, agents or howsoever called from interim or remaining or dealing in any way whatsoever with the Plaintiffs said land.
3. Costs
4. Any further order or order as this Honourable Court may deem just.

The defence filed by the Appellant was as follows:-

1. The Defendant denies trespassing on the Plaintiffs alleged land or at all.
2. The Defendant will say that he is the owner of a piece of land at Off Peninsular Road Goderich as far back as 1994 in which he is in possession.

3. The Defendant will further say that the Plaintiff's claim should be dismissed with costs.

Both parties were represented by counsel and each gave evidence on oath, called witnesses and tendered their respective conveyances.

The trial judge after reviewing the evidence gave what was termed "Judgement" on the 2<sup>nd</sup> of December 2006. This in actual fact was a review of the evidence and he stated

*"After much study I find the evidence in totality inconclusive Justice cannot therefore be done to other (SIC) side. In the circumstance I make the following orders:-*

1. *A team shall move to the site for a re-survey of the Parties lands.*
2. *The team shall consist of a representative from the court; the Plaintiff and the Defendant or their representatives, the licensed surveyor of plaintiff and of defendant. Plaintiff need not contract the same licensed surveyor. Both counsel may or may not be present at the re-survey.*
3. *The representative from the court shall conduct the exercise and his terms of reference is to record whether defendant has encroached into plaintiff's land. In doing so both surveyors must make sure that defendant's land is bounded on one side by the access road as stated in his schedule to his conveyance of 1994.*
4. *The Representative of the court shall produce and tender his Report at the next adjourned date stating whether there is encroachment or not.*



5. *I order the Plaintiff and the Defendant to pay for the exercise which should be concluded before the next adjourned date"*

The trial judge after accepting in evidence the Report of the Court official, on the 11<sup>th</sup> day of May 2006 delivered judgement in favour of the Respondent. He made the following orders:

1. The plaintiff is granted immediate possession of that part of the disputed land occupied by the defendant.
2. The defendant shall pay 6 million damages for trespass to the plaintiff.
3. An injunction is ordered as prayed for.
4. The defendant shall pay the cost of this action to be taxed.

The Appellant filed a Notice of Appeal against the judgement of 11<sup>th</sup> May 2006. The four grounds of appeal are:-

1. That the Learned Trial Judge erred in law and fact in holding that the Defendant had trespassed on the Plaintiff's land even though there was expert evidence to the effect that there is no encroachment on the plaintiff's land and that the properties of the Plaintiff and the Defendant are separate with a common access road.
2. That the Learned Trial Judge erred in law when he granted "immediate possession of part of the disputed land occupied by the Plaintiff in his Statement of Claim nor was it part of the Plaintiff's case.
3. That the Learned Trial Judge misdirected himself and consequently erred in law when he based part of his judgement on a report of a locus in quo

to the Plaintiff and Defendant's respective properties conducted in his absence and in the absence of relevant persons including the surveyors of the Plaintiff and Defendant who were necessary for the conduction of the said exercise.

4. That the said judgement is against the weight of the evidence.

In support of ground 1 of The Notice of Appeal counsel for the Appellants' contention is that there was evidence before the judge that there was no encroachment on the Respondent's land by the Appellant. Citing evidence in chief of Albert Joseph Samai the licensed surveyor engaged by the Respondent who had testified that he went on the site and plotted the two documents and that there was no encroachment. Counsel submitted that there was no evidence of trespass against the Appellant.

Counsel for the Respondent's answer to the above submission was that the Appellant unlawfully occupied land either instead of his or together with his own and that Respondent's case was not that the survey plans of the parties encroached on each other or that on the ground the two pieces of land overlapped.

The only evidence adduced on this point was that in exhibit 'C' the report on the encroachment plan exhibit 'B' prepared by the surveyor of the Respondent the surveyor stated in that report that the Appellant's surveyor did not locate the Appellants' land on the correct point on the ground. However this was not shown on the encroachment plan. Exhibit 'B' clearly reproduced the two pieces of land separated by an access road. This piece of evidence also contradicts the witness' evidence-in-chief in which he stated *"I went to the site and plotted the two documents. There was no encroachment. I made a composite plan and*



*made a report*". This is rather unfortunate as this witness was the only expert witness in the matter. However he did not properly address the issue of encroachment on the ground. It was the Respondent who in his evidence stated "*The defendant built a wall on my land ..... The wall was around my foundation*". The defence filed by the Appellant was merely a general denial of the claim of trespass and that he the Appellant owned a piece of land at Off Peninsular Road Goderich of which he was in possession. Up to the close of their case this was the only evidence adduced by the parties. The learned trial judge did state that the evidence was inconclusive. He therefore made the Orders dated 2<sup>nd</sup> December 2006 for a visit to the locus in quo to clarify the issues in contention.

The Orders were very specific as to how the locus in quo should be conducted. I had set out above the orders *in extenso* because it is apparent that it was the view of the learned trial judge that only further evidence to be obtained at the locus in quo could help him reach a fair decision.

This brings me to an examination of exhibit 'C', the Report of the Court Official. Were the orders of 2<sup>nd</sup> December 2006 complied with? The 1<sup>st</sup> Order was that a team should move to the site for a re-survey of the two pieces of land. Only the Court Official and the Respondent attended the locus in quo. The Appellant and the parties' surveyors were not present. In fact, it appeared from the report that only one piece of land was inspected and obviously no re-survey was done. The court official relied on statements made by the Respondent and two ladies who were at the inspected piece of land and who were not part of the team as ordered by the learned trial judge. In short the locus in quo was not conducted as per Orders of 2<sup>nd</sup> December 2006.

What further evidence did the Report of the Court Official add to enable the learned trial judge to make Orders 1 & 2 of the judgement appealed against? He appeared to have relied on what he termed "*the important part of the Report of the locus in quo*", that is the statement made by the Respondent that he built the larger of the two zinc structures on the piece of land inspected and statements made by the two ladies referred to above. In my view there was nothing in their statements which added any clarification to the evidence already before the court.

It is an established legal principle that in an action of trespass the Plaintiff is entitled to recover damages if he proves trespass to land to which he has possession. Livesley Luke C.J. in the case of *Dr. C.J Seymour Wilson V Musa Abess, 1981* an unreported case of the Supreme Court stated:-

*"In a case of trespass the court is concerned only with the relative strengths of the titles of possession proved by the rival claimants – the party who proves a better title or a better right to possession succeeds, even though there may be another person not a party who has a better title than he".*

In this particular instance evidence adduced before the visit to the locus was deemed not conclusive by the judge. He believed he could not do justice to either side by that evidence. The outcome of the locus in quo was to be the deciding factor.

However at the locus in quo the team ordered by the learned trial judge was incomplete. There was no re-survey of the two pieces of land to determine the exact locations of land delineated on the two survey plans attached to the conveyances tendered by the parties in evidence.



Furthermore it is a mystery how evidence of who has a better right to possession of the land in dispute could have been obtained with the learned trial judge and both counsel not at the locus in quo. I am astonished that the learned trial judge accepted the report of the Court official even with the obvious non-compliance with his orders and that he gave judgement based on the findings contained in the report.

However I am of the view that even if the Orders were fully complied with it is doubtful whether any judgement which relied on the findings of the very peculiar Orders of 2<sup>nd</sup> December 2006 would have been deemed safe. It is highly irregular that the Learned Trial judge delegated to the Court official his responsibility to examine the main issue in contention i.e. whether the Appellant encroached on the Respondents' land. This is vital evidence which ought to have been examined and determined by the Learned trial judge with the input of the parties and both Counsel, certainly not gleaned from a report by a Court official.

I uphold the submission of Counsel for the Appellant that the locus in quo is a complete departure from established procedure. I hold that the flaws in the learned trial judge's conception of a locus in quo could not have produced the evidence he thought necessary to reach a judicious conclusion.

The West African Court of Appeal held in "*Chief Nwizuk v Chief Enevok* (1954) 14 WACA 254 that a visit to the locus in quo does not make the Court cease to be a court though it was an inspection away from the court.

I hold that any evidence of trespass obtained at the locus in quo of 29<sup>th</sup> April 2006 is faulty and not admissible. However it means that we are back to the



situation before the locus in quo. I agree with the learned trial judge that up to this point the evidence is inconclusive.

I therefore rule that the Learned Trial Judge's admission of the Report of the Court Official in evidence and his conclusion that the Appellant has trespassed on the land of the Respondent based on the Report of the Court Official is unsafe and a gross miscarriage of Justice.

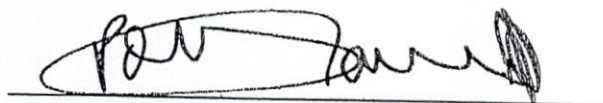
In the event I see no point in dealing with the other grounds of appeal.

I hereby order a retrial of the action.

I further order that each party bears his costs in both the lower court and in this appeal.



Hon. Justice Salimatu Koroma J.S.C.



Hon. Justice P.O. Hamilton J.S.C.