

CIV. APP. 49/2005

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

RUGIATU M. MANSARAY - APPELLANT

AND

ISATU BANGURA - RESPONDENT

CORAM:

Hon. Mrs. S. Bash-Taqi, - JSC

Hon. Ms. S. Koroma - JSC

Hon Mr. Justice E. E. Roberts - JA

Barristers

S. M. Sesay, Esq. of Serry-Kamal & Co for the Appellants

K. L. Lisk Esq. for the Respondent

JUDGMENT DELIVERED ON *26th* DAY OF *March* 2009

S. BASH-TAQI: - On the 14th day of July 2005, the Hon. Mr. Justice M. E. Tolla Thompson, JA (as he then was) delivered Judgment against the Appellant in the matter.

The matter concerns ownership of a piece of land at New Freetown/Waterloo Road Kissy Freetown. By a Writ of Summons dated 30th July 1992 issued in the High Court by the Appellant, then Plaintiff, against the Respondent, then Defendant, the Appellant claimed (1) Damages for trespass, (2) Damages for malicious damage (3) An injunction restraining the Respondent by herself her servants agents or privies or howsoever called from entering and remaining on the Appellant's said land.

In her Statement of Claim the Appellant pleaded, inter alia, that she is the fee simple owner and entitled to possession of land situate Off Grassfield Power Magazine Kissy Mess Mess Freetown bounded from property beacon marked FC 142/91 on a bearing of 294 degrees 15 minutes for a distance of 50.5 feet along private property to property beacon marked FC143/91 on a bearing 107 degrees 30 minutes for a distance of 65.0ft along an Access Road on to property beacon marked FC 145/91 on a bearing of 219 degrees 00 minutes for a distance of 100 feet on to property beacon marked FC 142/91 which is the starting point the whole enclosing an area of 0.121 Acres as shown in Survey Plan numbered L. 350/91 dated 24th April 1991. After purchasing the said land she surveyed it and erected beacons thereon; that between December 1991 and July 1992, she discovered that the Respondent had unlawfully and wrongfully entered her land and maliciously damaged her beacons; that shortly after this incident the Respondent on

another occasion unlawfully entered her land and dug up soil thereon and had been doing so on various other occasions. She threatened to continue in the said acts.

The Respondent filed a Defence and Counterclaim. She denied that she had trespassed on the Appellant's land and put her to strict proof thereof. She averred that she is the fee simple owner of the land in dispute by virtue of a Conveyance dated 13th December 1990 registered as No. 1728/90 at page 25 in Vol. 445 of the Record Books of Conveyances (Exh. "G"); that the land she entered was her bona fide property and denied that she unlawfully entered the Appellant's land; she also denied that the Appellant is entitled to the special damages claimed. In her counterclaim, she asked for a declaration of title to the land, damages for trespass as the Appellant, since 1991 unlawfully entered her land and had proceeded to erect a structure thereon and has remained in unlawful possession and persisted in her unlawful conduct. She also claimed recovery of possession and an injunction.

The Appellant filed a Reply and Defence to the Counter claim. In her Reply she denied the several allegations in the defence and joined issue with the Respondent. In the Defence to the Counterclaim, the Appellant, inter alia, alleged that she acquired the land from a Vendor who was the fee simple owner and the person entitled to possession of the said land. She stressed that her Vendor was the fee simple owner and entitled to possession of the said land; that she was lawfully on the land and denies that she was trespassing or encroaching on it.

The trial at the High Court was conducted by Tolla Thompson J. (as he then was). Both parties were represented by Counsel, and each gave evidence on oath and called witnesses including their respective Surveyors and tendered documents including their respective Conveyances in support of their titles. In the course of her evidence in the Court below, the Appellant contended that she paid Le 68,000.00 for the land in 1989 and started laying a concrete foundation and a 'panbody' structure thereon early in 1990. Her Vendor Saidu Bangura executed a Conveyance in her favour on 21st November 1991 which she caused to be registered on 26th November 1991 as No. 1722/91 in Vol. 456 at page 122 in the Books of Conveyances in the Office of the Registrar-General Freetown.

The Learned Trial Judge after hearing the evidence delivered Judgment on 14th July 2005 dismissing the Appellant's claim and awarding the Respondent the Declaration of title she claimed in her Counterclaim. The Judge also dismissed the claim for general damages.

In dismissing the Appellant's claim, the Learned Trial Judge, after reviewing the evidence, had this to say: -

"It can be gleaned from the above documentary evidence that Exh "B" the conveyance of the Plaintiff was registered about a year after Exh. "G", the conveyance of the defendant. The law is settled that when the issue is as to who has a better right to possess a particular piece of land the law will ascribe possession to the person who proved{sic} a better title....."

As to proof of a better right to possession the Learned Trial Judge relied on and adopted the dictum of Livesey Luke, C.J. in the case of Seymour Wilson v Musa Abess, S.C App. 5/79 {unreported} where he held: *"In a case of trespass what the plaintiff had to prove is a better right to possession than the defendant. One of the ways that he may do this is to prove that he had a better title to the land than the defendant. But "better title" in the context in a case for trespass the court is concerned only on the relative strengths of the title or possession proved by rival element. The party who proves a better right or better right to possession succeeds even though there may be another person or a party who has a better title than him"*

The Learned Trial Judge then went on to conclude his findings when he said in his Judgment:

"It seems to me, on the relative strength of the documentary evidence, that the defendant has a better claim to the disputed land than the plaintiff. In the result I hold that the plaintiff has failed to prove his claim for trespass against the defendant. The plaintiff's claim is dismissed."

As regards the Defendant's Counterclaim for a Declaration of title, the Learned Trial Judge in his judgment concluded inter alia:

"The defendant has counterclaimed for a declaration of title to land and trespass in her particulars. There is clear and sufficient evidence which I accept and believe that the land was first conveyed to the defendant and then subsequently conveyed to the plaintiff by PW2. The defendant subsequently registered the conveyance of the land in dispute on 13th December 1990 almost one year before the plaintiff's conveyance was registered on 26th November 1991 which gives her a better right of ownership to the land as against the plaintiff. On the evidence therefore I am satisfied that the defendant has proved her claim for a declaration of title to and possession of the said land. She is therefore eminently entitled to the declaration prayed for in her counterclaim....."

The Plaintiff being dissatisfied with the judgment has appealed to this Court on four (4) Grounds appearing at pages 79-80 of the Records of proceedings. They are as follows:

1. The Learned Trial Judge failed to consider or failed to consider adequately that the time the Appellant/Plaintiff issued the writ of summons she was in exclusive possession of the land in dispute and was erecting a dwelling house on the said land. That in fact the Appellant had a concrete foundation on the land.
2. That the decision is against the weight of the evidence.
3. That the Learned Trial Judge failed to consider the evidence of PW2 Saidu Bangura when he told the Respondent that her land was by the sea and not where the appellant was erecting her dwelling house.
4. The Learned Trial Judge failed to consider that the appellant was in exclusive possession of the land in dispute

Both Counsel filed Skeleton Arguments upon which they relied for the appeal.

Mr. S. M. Sesay for the Appellant argued all four (4) of his grounds of appeal together and rightly so since Grounds 1, 3 and 4 relate to the issue of possession, namely, whether or not the Learned Trial Judge 'failed to consider or adequately considered' the issue that the Appellant was in exclusive possession of the disputed land, and trespass and the third ground deals with the decision being against the weight of the evidence.

Mr. Sesay of Counsel submitted that the Learned Trial Judge rejected clear evidence that the Appellant was in exclusive possession of the land she having already built a concrete foundation and structure thereon at the time the Writ of Summons was issued; that the Judge based his judgment on the fact that the land was first sold to the Respondent whose Conveyance was then registered before that of the Appellant, and thus concluding that by virtue of first registration of the Conveyances, the Respondent has a better claim to the land. He submitted that in coming to that conclusion the Trial Judge ignored or wrongly applied the dictum of E. Livesey Luke C.J in the case of **Seymour Wilson v Musa Abess SCA 5/79**, when he said in his judgment, citing the said dictum:

"I entirely agree with the law propounded above. However, I venture to say, since in this jurisdiction there is no provision for the registration of title, registration of instrument will not confer title on the purchaser but in my judgment it can be used as evidence of ownership of the land in dispute."

He submitted that the evidence of the common Vendor, PW2, was clear that he did not sell the land in dispute to the Respondent but to the Appellant; that PW 2 was quite emphatic that the land the Respondent was claiming belonged to the Appellant even though the Appellant's Conveyance was registered one year after that of the Respondent's; that the prior registration of the Respondent's conveyance before that of the Respondent, did not confer any title to the Respondent as the Appellant has always been in exclusive possession of the land; that in the premises it was the Respondent who trespassed on the Appellant's land. To buttressed his submission, Counsel relied on the evidence of PW1, PW2 and PW3 the Surveyor who prepared Exh. "J" the encroachment plan. Counsel further submitted that the Trial Judge did not take advantage of the benefit of hearing the witnesses and therefore drew the wrong inferences from their evidence.

In his reply Mr. Lisk of Counsel for the Respondent submitted that the Learned Trial Judge adequately considered the issue of trespass based on the evidence before him. He submitted that at page 64 of the Records the Trial Judge said quoting the decision in **Bristow vs. Carminean {1873} 3 App. Cas. 641** that: "...In an action for trespass possession is sufficient to support an action by a wrongdoer so long as it is clear, exclusive and exercised with the intention to possess."; also quoting the decision of **Kamara v Fafanah {1964-66} ALR (SL)** at page 413 the Judge said: "When possession becomes doubtful the law attaches it to title provided such possession is clear and exclusive." He submitted that this is a clear indication that the Trial Judge averted his mind to the issue of possession and trespass.

In addition, Counsel referred to the evidence of the Respondent and that of the Appellant at page 23 to buttress his submission that the Judge adequately considered the issue of exclusive possession; that the Appellant in her evidence said she met beacons on the land

and had met the Respondent on the land on several occasions. In reply to the Appellant's second ground of appeal that the decision is against the weight of the evidence, Mr. Lisk referred us to the evidence of PW2 the common vendor and DW1 John Turay the vendor's friend and agent and submitted that there was enough evidence before the Judge to suggest that the PW2 sold the same land twice, first to the Respondent and later to the Appellant and therefore the Trial Judge correctly applied the dicta of **Mr. Justice Livesey Luke C.J in Seymour Wilson vs Musa Abess**, supra. He stressed that the Judge adequately determined the issues before him and based his findings on the evidence adduced. He urged us to dismiss the appeal.

Let me first of all say here that I agree with the facts as set out by the Learned Trial Judge and with his view that the main issues of contention in the action are trespass and a declaration of title.

In a long line of cases culminating with the leading authority of **Seymour Wilson vs. Musa Abess**, supra, it has been established that in an action for a declaration of title the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's title. The Learned Trial Judge in this case did not lose sight of the above principle. At page 65 of the record he had this to say when dealing with the Respondent's Counterclaim for declaration of title:

"As in the case if a plaintiff who claims a declaration of title, by counterclaiming[sic] for a declaration of title, the principle of law applies also to a defendant that she must succeed on the strength of her title and not on the weakness of the plaintiff's title."

In deciding what a plaintiff who claims or a defendant who counterclaims for a declaration of title must prove, the Learned Trial Judge identified two issues, namely, that where the parties in an action for a declaration of title to a disputed land rely on their respective deeds of Conveyance as evidence of title, the Court must confined itself in deciding the issue on the documentary title only, and in deciding the issue of the documentary title, the Court will have regard to Section 4 of the Registration of Instruments Act CAP 256 of the Laws of Sierra Leone.

The Learned Trial Judge had this to say with regard to the issues of trespass and possession:

"By the pleading the issues which have to be decided are trespass and declaration of title to the property as averred by the plaintiff and the defendant respectively. The plaintiff has averred certain facts suggesting that the defendant trespassed on the land in dispute. In an action for trespass possession is sufficient to support an action by a wrong doer so long as it is clear, exclusive, and exercised with the intention to possess." (see page 65 of the Records).....

.....
The issue which was quite clear from the pleadings, and which the Learned Trial Judge dealt with, was which of the parties had better title to establish ownership on production of their respective Conveyances.

He called in aid the decisions in *Bristow v Carmican* [1878] 3AC 641; *Wuta Ofoi v Danguah* [1961] 1WLR 1238; *Kanu v Kamara* 1964-66 ALR (SL) 136, and opined that documentary title commencing with some person in possession connecting it with the Plaintiff is sufficient to maintain an action for trespass by the Plaintiff against a wrongdoer. Also relying on the decision of *Kanu vs. Kamara*, where 38 Halsbury's *Laws of England* 3rd Edition page 745 para. 124 dealing with a person in possession was cited with approval, the learned Judge quoted that: "...when possession is doubtful the law attaches it to title" provided "such possession is clear and exclusive". Again relying on *Bristow v Carmican* supra, the Trial Judge concluded that when the issue is as to who has a better right to possession of a particular piece of land, the law will ascribe possession to the person who has a better title."

I see no reason to disagree with the above principles of law propounded by the Trial Judge. On the issue of possession apart from his examination of the law, the Learned Trial Judge also considered the evidence adduced by both parties and their witnesses in support of their respective claims as to which of them has a better right to possession of the disputed land. Counsel for the Appellant relied on the evidence of PW2, PW 3 & PW4; he argued that the Appellant was in exclusive possession of the disputed land because she had constructed a concrete foundation and a corrugated iron hut thereon. This may well be the case, but when she was giving oral evidence, she stated that when she went on the land to survey it, she met beacons on it (See page 23). There is therefore a presumption that someone else was on the property before her. Indeed, she said she later met the Respondent and her son on the land; she met them on several occasions digging; that on one occasion, she complained to the common Vendor, PW2 about the Respondent's persistent entry on the land (See page 23). Appellant said further that when she started building her foundation in early 1990, the Respondent also went on the land to do the same thing, (see page 22 lines 3-4); that even when the common Vendor told the Respondent that the land was not hers, and she should not erect any beacons there, the Respondent 'still continued to go on with building of the corrugated iron hut' (see lines 7-8 page 22). Again at line 19 of page 22, she said, that her beacons were removed. It is clear, that on a closer examination of the evidence and on a proper evaluation of it, the Court found that the property the Appellant was claiming was not in the exclusive possession of the Appellant contrary to what her Counsel is claiming.

The Learned Trial Judge referred to the pleadings and the evidence before the Court and found that the Respondent not only paid the common Vendor in 1987 for her land, but also registered her documents one year before the Appellant registered hers. He therefore determined the issue of title by reference to the parties' respective title deeds relying on the decision in *Seymour Wilson v Musa Abess*, supra and the dicta of Chief Justice Luke, which dicta is the subject matter of Counsel for the Appellant's complaint. What the Trial Judge was saying in his judgment, is that since there are no provisions in our laws for registration of title, the registration of a Conveyance or instrument will not confer title on a party; that such registered instrument can only be used as evidence of ownership, (not title,) of the disputed land. The Trial Judge applied the principle correctly. In other words, in a situation where there are competing claims from a common vendor, registration of a party's instrument confers priority over another instrument affecting the same land which was registered at a later date.

In this case since both parties allege ownership of the disputed land based on their respective Conveyances obtained from Saidu Bangura, a common vendor. The

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Respondent bought the land in 1987 and registered her conveyance in 1990; the Appellant on the other hand bought the land in 1989 and registered her conveyance in 1991. The Learned Trial Judge was correct to determine the issue of which of them has a better title to the disputed land, by reference to the date of registration of the respective Conveyances and using the principle propounded by Chief Justice Livesey Luke in the Seymour Wilson case.

With regards to the issue of trespass, the Learned Trial Judge opined that documentary title commencing with some person in possession connecting it with the plaintiff, is sufficient to maintain an action for trespass by the plaintiff against a wrong doer", (See **Canvey Island Commissioners v Preddy (1) (1922) 1CH 190; and Kamara v Fofana [1964-66] ALR (SL) P413**

I agree with the findings of the Learned Trial Judge and I see not reason to interfere with the above proposition of law. The Learned Trial Judge adequately considered the issues of trespass and possession by reference to authorities and the existing law. He clearly examined what is sufficient to maintain an action for trespass by a person in possession against a wrong doer.

It seems to me from the evidence that Saidu Bangura, the common Vendor's evidence which Counsel for the Appellant is relying on in support of his grounds of appeal is very uncertain and inconsistent. On one occasion the Vendor even denied executing a Conveyance in favour of the Respondent until a hand writing expert had to be called to prove that the thumb-print on Exh. "G" was his (See page 26). He said the Respondent paid him for the land in 1989 but later admitted that the purchase price was paid in 1987, only when a receipt he had given to the Respondent was produced (see Exh. "C" & page 26 xxed of PW2). The Judge was right to conclude, after reviewing the evidence in the case, that there is no hard and sufficient evidence that the Appellant was in actual possession of the disputed land to sustain a claim for trespass against the Respondent.

I agree with the conclusion of the Trial Judge. Believing or disbelieving a witnesses is within the competence of the Trial Court and where such belief is supported by any evidence howsoever slight an appellate Court will not normally interfere (See **Okekey Agencies v Lahai, Civ. App. 32/2005 (unreported)**). I hold that in this case there is clear evidence to justify the finding of the Trial Judge in not awarding title to the Appellant, and I may venture to say that the evidence of possession adduced by the Appellant is not clear and exclusive to have persuaded the Learned Trial Judge to conclude otherwise. A Plaintiff who relies on the fact of possession by himself or his predecessor in title must prove more than just mere possession (see **Sorie Tarawalli v Sorie Koroma S.C. Civ. App. 7/2004 (unreported)**).

I have already held that the Respondent has prior possession of the land and such prior possession raises the presumption that she is seised in fee simple of the land. She has also shown from the evidence that she has a better title not only as against the defendant but that there is no other person claiming a better title than herself to the land. The party who proves a better title or better right to possession succeeds though there may be another person or a party who has a better title than him" (*dicta of Livesey Luke C.J in Seymour Wilson v Musa Abess Supreme Court Appeal 5/79*).

I find that the Trial Judge was right in making a declaration in favour of the Respondent as claimed in the Counterclaim. The date of her purchase of the land and the registration of her conveyance was never challenged. It has been established in a long line of cases that in an action for a declaration of title the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's title. The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. In this case the Respondent in her Counterclaim satisfied the Learned Trial Judge that she is entitled to the declaration claimed.

It is an established principle of law that an Appellate Court will not readily disturb the findings of facts of the Trial Court, unless the facts do not support the findings of the Trial Court or findings have violently contravened a principle of law, or the findings are contrary to the facts or the facts have not been evaluated.

In my view the Trial Judge evaluated the facts adequately before his findings. I have reviewed the whole evidence carefully and hold that on a balance of probability the Respondent has established that she is the owner of the property situated at New Freetown/Waterloo Road Power Magazine Kissy Freetown in the Western Area of Sierra Leone. The Appellant's claim is therefore dismissed.

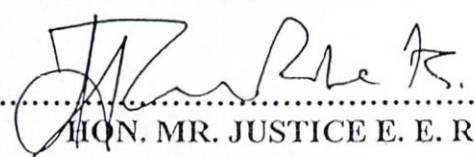
In view of what I have said above, I hold that there are no merits in the Appellant's Grounds of Appeal. In the premises the appeal fails and I order as follows:

1. The Appellant's appeal is dismissed;
2. The Judgment of the High Court is confirmed;
3. The Respondent's Counter Claim succeeds;
4. The Respondent is entitled to recover possession of the disputed land from the Appellant as claimed in her Counter-Claim;
5. The Respondent is to have this cost of this appeal. Such cost to be taxed.

 - 26/03/08
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HON MRS S BASH-TAQI, JSC

I AGREE.....

HON. MS S. KOROMA, JSC

I AGREE.....

HON. MR. JUSTICE E. E. ROBERTS, JA