Civ.App.44/05

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

SAMAH BANGURA
REV. JAMES MANYEH - APPELLANTS

AND

SALAMATU KAMARA - RESPONDENT

CORAM
Hon Justice P.O. Hamilton
Hon Justice E.E. Roberts
Hon Justice A. Showers

SOLICITORS
A.E. Manley Spaine Esq, for Appellants
S.M. Sesay Esq. for Respondent

JUDGMENT DELIVERED ON THE 16th DAY OF June 2009.

HAMILTON J.S.C. – This is an appeal against the Judgment of the Hon. Justice L.B.O. Nylander J. dated 10th June 2005 in which the Plaintiff/Respondent herein instituted an action against the Defendants/Appellants claiming among other things a declaration that she is the fee simple owner and the person solely entitled in the fee simple in possession of the land described on Survey Plan No.LS.1158/90, damages for trespass and a perpetual injunction against the defendants jointly and severally. Judgment was given in favour of the Plaintiff/Respondent. It is against this Judgement that the Defendants/Appellants have now appealed.

It must be noted at this stage that the grounds of appeal filed as contained in pages 74 and 75 of the records contain certain numberings which were not only irrelevant but absolutely unnecessary as they are not grounds of appeal but rather arguments in the appeal. These are numbered 3(1), 5, 5 and 5. It must be made clear here that this is a senior Court for which Counsel must go through his papers with the best correcting instrument before filing.

In this appeal therefore there are three (3) grounds of appeal namely:-

1. That the Learned Trial Judge was wrong in law and on the facts in declaring that the Plaintiff/Respondent is the owner of the land claimed by the Plaintiff/Respondent.

2. That the Learned Trial Judge was wrong in Law and on the facts not to dismiss the case against the 1st Defendant having regard to the evidence led by the Plaintiff and her witnesses against the 1st Defendant and the finding of the Honourable Trial Judge that the Defendants never built on the disputed land.

3. That the Learned Trial Judge was wrong in law to shift the burden of proof from the Plaintiff to the 1st Defendant.

A brief review of the process adopted in this matter would reveal the anomalies in it. A Writ of Summons dated 15th March, 2000 was served on both Defendants/Appellants. On 23rd March 2000 Franklyn B. Kargbo entered appearance for both Defendants and on 23rd March 2000 A.S. Sesay Esq. then entered appearance on behalf of 1st Defendant and on 2nd May 2000 the matter was then entered for trial. On 22nd December 2004 a notice of appointment of A.S. Sesay Esq. as Solicitor for 2nd Defendant was filed and on 17th March, 2005 a notice of motion was filed seeking an order that leave be granted 2nd Defendant to file a defence out of time and leave to defend the action. Reading the records this motion was never moved but rather abandoned. However there was exhibited the Conveyance of 2nd Defendant at Pages 25 to 28. I shall consider this in detail in the course of this judgment.

The parties gave evidence and called witness both for the Plaintiff/Respondent and the Defendant /Appellants. It is worthy to note that it was the 1st Defendant that was actively involved in these proceedings. The following documents were tendered – Exh. A_1 the Conveyance between Mohamed Abdul Bangura and Salamatu Kamara the Plaintiff/Respondent herein) dated 3rd August, 1990. Exhibit B_1 the Statutory Declaration of Sema Conteh (deceased) sworn to on 12th January, 1989 and Exhibit C_1 an indenture of Conveyance between Sema Conteh (deceased) and Mohamed Abdul Bangura dated 16th October, 1989. The 1st Defendant/Appellant did not produce any document but merely gave evidence that the land in dispute is the property of his late father which he sold to the 2nd

defendant/appellant in the year 2000. The evidence of Kalah Kekura Jawara is important since he prepared the survey plan of the Plaintiff/Respondent in 1990 when she did engage his services and identified the plan in Exhibit A_1 as that of the Survey Plan he prepared. According to him one Surveyor Joseph Simor who is the Surveyor for 1st defendant took him to the land which he identified as the plaintiff's land. This evidence clearly shows that 1st defendant did go on the land as indicated by this witness through his surveyor. The Plaintiff in her evidence did state that she bought the land from Mohamed Abdul Bangura who bought it from Sima Conteh in 1989.

It is well established that in an action for a Declaration of Title to land the plaintiff must succeed on the strength of his title and not on the weakness of the Defendant's title (see *Dr. Seymour Wilson v. Musa Abess Civ. App. No. 5/79 (unreported) and Kodilinye v Odu (1935) WACA 335 at 337-338.* The main issue therefore is whether the Appellant/Respondent did lead enough evidence to prove that the land she is now claiming belongs to her. It is clear that the claim of title by the Defendant/Respondent as contained in her pleadings was supported by oral evidence especially that of P.W.4 Kalah Kekura Jawara the Surveyor. There is nothing tendered by 1st and 2nd Defendant/Appellant to show their claim to the land except that the land in question is the property of Sama Conteh the deceased father of 1st Defendant who sold to the Vendor of the Plaintiff/Respondent in 1989.

This now brings me to consider the position of the 2nd Defendant/Appellant. Counsel for the 2nd Defendant/Appellant did not in his synopsis of argument say anything about 2nd Defendant/Appellant except that the Learned Trial Judge was wrong to shift the burden of proof to the 2nd Defendant/Appellant when he said at page 54 of the records:

> *"I must say it was an anti-climax for me when I went through all the documentary evidence before me, but could not find any tendered for 2nd defendant – Rev. James Manyeh. The 2nd defendant did not come before this Court nor is there Title Deed supporting his claim to ownership of this land he built on....."*

There was filed a Notice of Motion to file a proposed defence out of time and defend this action by 2nd defendant but it was abandoned. This is contained at Page 29 of the records and at Page 25 is the Conveyance from Sema Conteh to Rev. James Kai Manyeh which is not an exhibit in this matter dated 1st September, 1999. It would be noticed of interest that the Survey Plan at Page 27 contains verbatim all the dimensions bearings and coordinates as that in Exh. C, which is at Page 91 of the records. This is a big coincidence for a Survey Plan prepared by P.W.4 to carry the same dimension distances and coordinates in a Survey Plan not prepared by him.

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In my humble opinion Rev. James Kai Manyeh bought his land he has already sold to Mohamed Abdul Bangura in 1989 which is ten (10) years ago which land Mohamed Abdul Bangura has sold to the Plaintiff in 1990. It follows therefore that at the time Sema Conteh sold to the 2nd Defendant/Appellant he has nothing to sell and merely sold a worthless piece of paper to the 2nd Defendant/Appellant (Nemo dat quod non habet). In my humble opinion there was no need for the Learned Trial Judge to even refer to the 2nd Defendant/Appellant in his judgement.

The main crux of this appeal is on the evaluation of the evidence by the Learned Trial Judge. It raises the issues as to whether this is a case in which the Appellate Court can interfere with the findings of the Trial Judge. In *Seymour Wilson v. Musa Abess (supra) Livesey Luke C.J. after considering Watt or Thomas v Thomas 1947 A.C. 484 and Benmax v. Austin Motors Co. Ltd (1955) 1 ALL E.R. 326* said at Page 66 to 67 of the printed unreported case:

"So while Learned Counsel for the Plaintiff would have us reverse the findings of fact of the Trial Judge, Learned Counsel for the defendant urged that we should uphold the finding of fact of the Trial Judge. There is no doubt that an appellate court has power to evaluate the evidence led in the court below reach its own conclusions and in a suitable case to reverse the finding of fact of the Trial Judge. But these powers are exercisable on well-settled principles, and an appellate court will not disturb the findings of fact of a trial judge unless those

principles are applicable ..... the appellate court is, however, free to reverse his conclusion if the grounds given by him, therefore, are unsatisfactory by reason of material inconsistencies or inaccuracies, or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen or heard the witnesses, or has failed to appreciate the weight and bearing of circumstances admitted or proved". Lord Reid in Benmax v. Austin Motors Co. Ltd (1955) 1 ALL E.R. 326 at 329 said:

"But in cases where there is no question of the credibility or reliability of witnesses, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.

In Okekey Agencies v. Kelfala Lahai and Khadijatu Lahai Civ. App. 32/2005 (unreported) Tejan-Jalloh J.S.C. (as she then was) dealing with this question of the evaluation of the evidence by a trial judge quoted with approval the case of Joint Venture Construction Co. Ltd. V. Conteh and others 1971 – 72 ALR S.L. 145 at 150 where Tambiah J.A. said:

"It is a well settled principle of law that judges' findings made after the hearing of witnesses, and observing their demeanour, are entitled to great weight and should not be disturbed, unless it is clear that they are unsound ..... but it is often open to an

appellate court to find that the view of a witness was ill-founded. Where the point to a dispute has to be decided by the proper inferences to be drawn from proved facts, an Appeal Court is in as good a position to evaluate the evidence as the trial judge, and may form its own independent opinion."

It is clear that the Learned Trial Judge after reviewing the totality of the entire evidence and watching the demeanour of the witnesses said at Pages 54 to 55 of the records:

"On the facts before me I believe the evidence of the Plaintiff and her witnesses. I do not believe the evidence adduced for the defendants. I am satisfied in my mind that when 1st Defendant testified that his late father sold this land to 2nd Defendant he was not speaking the truth. I am satisfied in my mind that the Plaintiff has proved her case on the balance of probabilities. I enter judgment in her favour ....."

It is my considered opinion the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a Trial Judge who saw, heard and duly assessed the witnesses. Where a Trial Judge unquestionably evaluates the evidence and justifiably assesses the facts, the duty of the Court of Appeal is to find out whether there is evidence on record on which the Trial Judge could have acted. Once there is sufficient evidence on record from which the Trial Judge arrived at his findings of fact, the Court of Appeal cannot interfere. The findings of fact made by a Trial Judge are entitled to be respected by an appellate court where it is

clear that the Trial Judge has adequately performed his primary duty of evaluation and ascribing probative value to the evidence before him. In such circumstances such findings are to be approached by an appellate court with due caution and not on the basis that it would or might itself find otherwise.

An appellate court must be very reluctant to interfere with discretion by a trial judge especially where it is not shown by the appellant as in this instant case, that the exercise by the trial judge occasioned him a miscarriage of justice or that it was not according to common sense. This is because the essence of discretion will be defeated, if that essence of option to pick and choose is absent.

In the instant appeal, looking at the totality of the case of the parties as contained in the records before the Learned Trial Judge including the pleadings filed and the evidence adduced together with the exhibits tendered, it is my candid view that the Learned Trial Judge dispassionately considered the case of the parties before him and even made reference to the 2nd defendant in his judgment who did not file in a defence but rather abandoned his motion for leave to file in a defence out of time and leave to defend the action and so came to the conclusion which he did. The judgment of the Learned Trial Judge in my opinion should not be interfered with. The case of the parties was painstakingly examined. This Appeal revolves primarily on issues of fact. There is nothing to show that the findings in the facts are erroneous. I therefore hold that the Learned Trial Judge was right in granting the respondents claim.

Consequently, I hold that the instant appeal lacks any substantial merit and it is accordingly hereby dismissed. The judgment of the Learned Trial Judge dated 10th June, 2005 is hereby affirmed. This appeal is therefore dismissed with cost such cost to be taxed.

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

I agree: .....
Hon. Justice E.E. Roberts J.A.

I agree: .....
Hon. Justice A. Showers J.