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Civ.
CC.APP.21/2006

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

SAMPHA KAMARA	}	
KADIATU KAMARA	}	**APPELLANTS**

AND

FATMATA KARGBO	-	**RESPONDENT**

CORAM
Hon Mrs. Justice S. Bash-Taqi, JSC (Presiding)
Hon. Ms. Justice S. Koroma, JSC
Hon. Mr. Justice E. E. Roberts, J. A.

Barristers
E. Kargbo, Esq. for **the Appellants**
C. C. V. Taylor, Esq. for the Respondent

JUDGMENT DELIVERED ON THE 26th DAY OF JANUARY 2010

S. BASH-TAQI, JSC: - The Appellants in this matter are brother and sister jointly sued in the High Court in an action brought by the Respondent, as Plaintiff, for the following relief: -

1. A declaration that the Plaintiff, (Respondent), is the fee simple owner of a piece or parcel of land situate lying and being No. 77D Kissy Bye Pass Road, Freetown.

2. A declaration that the Defendants (Appellants) are trespassers;

3. An injunction restraining the Defendants (Appellants) from further acts of interference on the Plaintiff's land.

In, in her Particulars of Claim, she alleged, inter alia:

1. That the piece or parcel of land lying at No. 77D Kissy Bye Pass Road Freetown was conveyed to her in fee simple by Mamy Iye Kamara in a Deed of Conveyance dated the 23rd day of January 1981 duly registered as No 89/89 at Page 119 in Volume 422 of the Record Book of Conveyances in the Office of the Registrar General in Freetown; that the said land is defined on Survey Plan No. LS 1599/87 dated 1st day of July 1987.

2. That the Defendant together with his agents and followers have been going to her land with a view to survey and demolish part of the premises thereon on the ground that it is his personal property.

3. That each time "the Defendant and his followers go to the land violent situations will result some of which have been the subject matter of police investigation."

The Appellants filed a Statement of Defence and Counter claim. They denied the Respondent's claim, and averred that they are the children of Alimamy Kargbo and N'Jama Koroma (both deceased), and that their parents are and were the fee simple owners of property situate lying and being Bye Pass Road Kissy Freetown; that they are in lawful occupation of the said land and had been such occupation before and after their parents' death. They counter claimed for a declaration of title on the strength of their parents' title and ownership of the said land.

The High Court (Nylander J, as he then was) gave Judgment for the Respondent. In his judgment, after reviewing the evidence, the Learned Judge concluded, inter alia:

> "As regards the Pan Body Shop building attached to the building under construction in the compound of the defendant, (it) encroached in the property of the plaintiff. I have reminded myself that the defendants have not (sic) title deeds in their names for the land they counterclaim. I therefore enter judgment in favour of the Plaintiff who has proved her case on a balance of probabilities."

In dismissing the Appellants' Counter Claim, the Judge said inter alia -

> "The defendants' counterclaim fails on the facts and also there is no proof that they personally own any land in the area....."

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He then went on:

> "If there was no counterclaim the defendants in their defence could have (stated) that they are the wrong persons to be sued. Their parents should have been the proper defendants. Thus on this point above the defendants cannot succeed in their counterclaim."

The Judge then wade the following orders, which I have reproduced below in view of the Appellants' 3rd ground of appeal:

> "1 A declaration in favour of the plaintiff as prayed for.
>
> 2. The defendants shall pay damages for trespass in the sum of Le 5,000,000.00;
>
> 3. A perpetual injunction is granted as prayed for;
>
> 4. The defendants shall end that part of the Pan Body Shop on the plaintiff's land;
>
> 5. The defendants shall pay the costs of this action to be taxed.

The Appellants being dissatisfied with the above judgment filed four grounds of appeal alleging misdirection and error of law. The grounds of Appeal read: -

1. The Learned Trial Judge erred in law in deciding that the only contentious issue is the "Panbody Kitchen built by the Plaintiff (Respondent) but proceeded to decide on the Appellants' shop.

2. The Learned Trial Judge erred in law having stated in his judgment that the defendants (Appellants) land is not in the Plaintiff's land by virtue of the locus visit report prepared by the court clerk Mr. Ansu and that the beacons in the Access Road form the common boundary between the defendants and the Plaintiff's land but further proceeded to adjudged that the Appellants' shop encroaches on the Respondent's land.

3. The Learned Trial Judge further erred in law in deciding that "the defendants shall end that part of the "Pan body" structure

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on the Plaintiff's land without specifying what part in terms of measurements that encroaches into (or forms part) of the said land.

4. That the judgment is against the weight of the evidence.

Both Counsel filed Skeleton Arguments upon which they rely. Mr. Kargbo, for the Appellants, arguing, Grounds 1 and 4, pointed out that, the real issue in dispute between the parties, which was borne out by the evidence, is the presence of "a Pan Body Kitchen" built by the Respondent on the Appellants' land in 1990; but stated that the Learned Judge based his judgment on an area described as a 'Shop'. He referred us to page 107 of the records, and submitted, that the area described as " a shop" was never an issue in the case; that the Respondent in her pleadings and oral evidence, not having complained that the "Shop" encroached on her land, Learned Judge ought not to have based his Judgment on the "shop". To buttress his submission, Counsel referred us, firstly, to the evidence of Marion Koroma, DW 4, at page 109, where the Learned Judge, in reviewing her evidence recorded her as saying:

"One day Plaintiff, her son and two men came to her (DW4) asking her to beg the defendants for the Kitchen she had built on the land";

And also the Court Registrar's Record of the evidence obtained at the locus in quo (page 109), where he recorded:

"The only dispute is the location of the kitchen. The measurement is 8' x 4". The second measurement is 8' x 3". The kitchen is owned by the Plaintiff."

Counsel again referred us to the Respondent's oral evidence at pages 98-100 where she said inter alia: -

"Defendants objected to a Kitchen I built. They say it was on their land. The defendants only objected in July 31 2003 to the Kitchen I built in 1990".

He submitted that from the above pieces of evidence, it is clear that the dispute is about a 'Kitchen' not a 'shop', that the Learned Judge therefore clearly misdirected himself when he ordered in his Judgment that: -

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"The Defendants shall end that part of the Panbody Shop on the Plaintiff's land...,

He emphasized that the Trial Judge was wrong to have granted a relief that was not pleaded. He relied several cases including that of **Seymour Wilson vs. Musa Abess, Civ. App. 5/77 (unreported); Lamin Turay & Oths vs. Osman Thomas, Civ. App. 3/99 (unreported); Also E. E. MacThompson vs Mamadu Sarjor Bah & Heckmet Joseph, Civ. App. 57/2005 (unreported) and Ven vs. Cole, 1968/69, ALR. S.L 331)**

Arguing grounds 2 and 4 together, Counsel referred us to the Judge's comments at page 111 of his Judgment wherein he stated:

"I have reminded myself that the defendants have not (sic) title deeds in their names for the land they counterclaim. I therefore enter judgment in favour of the plaintiff who has proved her case on a balance of probabilities".

He submitted that the Judge did not apply the proper standard of proof before coming to the above conclusion; that further wrongly evaluated the evidence and drew the wrong inference when he concluded, inter alia, that:

"If there was no counter claim the defendants in their defence could hold that they are the wrong persons to be sued." (See page 110)...,

He submitted that the Appellants defended the action because the Respondent made them parties to the action, they being the persons in occupation of the property and also being beneficiaries of their parents' estate. He said that the Judge's conclusion that if they had not counter claimed they would have had a good defence by alleging that they were improperly sued, is erroneous; that the only way they could have defended the action was by counterclaiming and relying on their parents' title to the property, and as occupiers of the adjacent property they were obliged to defend and claim on the strength of their relationship to the original owners.

Mr. Kargbo reminded us that the onus is on the party applying for the declaration to satisfy the Court that he is entitled on the evidence brought by him to the declaration. He called in aid the decisions on the cases of **Seymour Wilson vs. Musa Abess, supra; Lamin Turay & Oths vs**

Osman Thomas; Kondolinye V Odu; Sorie Tarawalli vs. Sorie Koroma, Civ. App. 7/2004. He submitted that the Learned Judge in his Judgment focused on the weakness of the Appellant's title, when he adjudged that the Appellants had no proof that they personally own any land in the area.

Counsel further submitted that the Learned Judge wrongly evaluated or misinterpreted the evidence of the Appellants' Surveyor, DW3, and Exh. "D"; that DW3's report and his oral evidence clearly stated that the Pan body structure encroached into property of L. S. 2982/78, by 8' x 9"; nevertheless, the Judge, he said went on to accept the encroachment plan submitted by the Respondent's Surveyor which does not relate to the real issues raised in the Writ

Counsel argued further that the Judge's failure to consider the Plan Exh. "D" and DW3's oral evidence adversely affected his view that the Panbody structure encroached on the Respondent's land; further, that the failure by Learned Trial Judge to consider the Report of the visit to the locus, which was necessary to clear the uncertainty as to the location of the land in dispute and to determine the level of encroachment, seriously affected his judgment; more particularly, he said the Learned Judge ignored the Registrar's findings in the Report, where he said:

> "The only dispute is the location of the kitchen. The measurement is 8' x 4", the second measurement is 8' x 3". The kitchen is owned by the plaintiff. The beacon is in the middle of the passage. No property of the defendant is in plaintiff's land"

He relied on the case of **Sorie Tarawalli vs. Sorie Koroma**, supra.

He concluded that based on the evidence before him, the Learned Judge's Judgment was flawed and judgment ought to have been entered for the Appellants. Counsel brought to our notice that even though the Trial Judge ordered the visit to the locus, he did not go with the Court; and it was only Court Registrar, the parties and their Solicitors that attended the locus.

C. C. V. Taylor, Esq. for the Respondent defended the Learned Judge's conclusions in dismissing the Appellants' counterclaim for a declaration. He also reminded us that a party seeking a declaration must succeed on the strength of his title not on the strength of another's title; that for the Appelants' claim to have succeeded, the Appellants should have

counterclaimed in a representative capacity, either as administrator of their parents' estate or as beneficiaries of such estate.

As regards the claim for trespass, he submitted that the specific act of trespass complained of, is the unlawful entry by the Appellants upon the Respondent's land, as stated by the Respondent in her oral evidence at page 9 &103 of the Records when she said:

> "Defendants and family destroyed my house.....I visited the land and observed a pan body structure.....On the following day the pan body structure was still there....A confusion started between the plaintiff's children and mine....."

He submitted that the above piece of evidence supports the Respondent's claim that the Appellants entered her land and that such entry was unauthorized and thus supports the Respondent's claim for trespass. He drew the Court's attention to the fact that the 1st Appellant did not give evidence at the trial therefore the case against him went unchallenged and as such, the 1st Appellant could not maintain his counterclaim for a declaration of title to the land.

Our short answer to the above is that the Appellants were sued jointly and severally, and therefore evidence given at the trial by one joint defendant will be applicable to the other. We will hold that the evidence adduced by the 2nd Appellant at the trial, is evidence for both Appellants; moreover the Statement of Defence filed by Counsel was in respect of both Appellants (See page 32 of the records). We do not find any merit in Counsel's submission.

With respect to the issue of the Shop, Counsel submitted that it was the Appellants that made the Shop an issue in their counterclaim for a declaration, and therefore the Learned Judge was right to have ruled on the issue. He relied on the evidence at page 7 of the Appellants' Counterclaim.

I will pause here to note that there is no mention of a 'Shop' in the Appellants' Counterclaim at page 7. It was Mr. Eric Forster's Survey Report at page 130 that first made mention of the 'pan body shop' as follows:

> "Pan Body shop building attached to the building under construction in the compound of the defendant encroached into the property of Fatmata Kargbo".

On the other hand, the evidence of Alexander Coker at page 140 mentioned a kitchen, as encroaching on the cadastral layout, follows:

> "As much as there is a lot of encroachment on the cadastral layout plan, physically, on the ground only a portion of the kitchen has encroached on the cadastral layout plan".

Counsel submitted that the Trial Judge evaluated the evidence of the Surveyors correctly and decided on the weight to attach to it, because he saw heard and observed the witnesses, therefore his assessment of the evidence and his conclusions are correct; that this Court cannot be called upon to determine the credibility of the respective Surveyors' reports not having seen and observed them as they testified. He relied on the dictum of the House of Lords in the case of **Watt or Thomas vs. Thomas (1947) A.C. 484** cited with approval in **Seymour Wilson vs Musa Abess, supra, and Rebecca Johnson & Robert Johnson & Others and Frederick Johnson vs. The Administrator & Registrar-General & Others Civ. App. 15/93.**

As regards the visit to the locus-in-quo, Mr. Taylor submitted that the report does not add or detract from any of the Surveyors' respective reports; that Judge said he "studied the report", and in his judgment, he relied heavily on the expert evidence of the Respondent's Surveyor; that the Judge could not have found for the Appellants, and urged the Court of dismiss the appeal.

In the alternative Counsel submitted that if we find merits in the appeal then the interest of justice would be best served by ordering a re-trial of the matter in lieu of upholding the appeal.

An important issue raised by Counsel for the Appellants during his address, is that of the visit to the locus-in-quo. In this case we observe that even though a visit to the locus was ordered, the Trial Judge did not go with the parties to the locus. We are told is that the Court Registrar and the parties and their Surveyors attended and it was the Court Registrar that conducted the proceedings.

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The usual practice when a trial judge visits a locus in quo is to make separate notes or records of the inspection. This is normally done by the Registrar of the Court who takes notes of what transpires at the locus, and when the Court resumes the notes made by the Registrar are produced and tendered in evidence by him and they then form part of the record of proceedings. After the inspection and on resumption of Court sittings, the evidence of witnesses who spoke at the locus on anything touching and concerning the subject matter should be taken on oath and those witnesses would be cross-examined by either party. This is to avoid the Trial Judge being accused of permitting his mind to be charged with matters not properly in evidence. (See the decisions in the cases of **Ejidike & Other vs. Obiria (1951) 13 WACA 278, and Mwizuk & Oths. Vs. Eneyok & Others (1953) 14 WACA 254.** What is important is that the visit must put to rest matters about which conflicting evidence has been led. The bottom line is that the Trial Judge by his visit to the Locus has not done anything that engendered a miscarriage of justice in the matter; what is frowned upon, when such a visit takes place, is for the judge making himself a witness.

In this instant case the issue that we have to consider is whether the procedure adopted by the Trial Judge during and after the visit to the locus in quo amounted to a departure from the established procedure and occasioned a miscarriage of justice.

In **Briggs vs. Briggs (1992) 3NWLR 128**, the Supreme Court of Nigeria Nnaemeka-Agu, JSC at page 148-149 said on the purpose of a visit to locus in quo:

> **"It has been settled by a long line of decided cases that when a conflict occurs on the evidence of both sides as to the existence or non-existence of a state of facts relating to a physical object, and such conflict can be resolved by visualizing the object, the material thing, scene of the incident or property I litigation, it is desirable for the court to apply its visual senses in aid of its sense of hearing by visiting the locus in quo. It has indeed been acknowledged by high authority that this form of evidence, often referred to as real evidence, is most satisfactory form of proof....."**

In the instant case, there is an allegation by the Appellants that the Respondent trespassed on their property. In her oral evidence, the Respondent said:

> "The Defendants objected to a Kitchen I built. They say it was on their land".

Furthermore, the Judge reported DW4, Marion Koroma, a witness for the Appellants' as testifying, at page 109:

> "Plaintiff, her son and two men came to her asking her to beg the defendants for the Kitchen she had built on the land."

There is also an allegation by the Respondent that the Appellants trespassed on her land. She said in evidence:

> "Defendants and family destroyed my house……I visited the land and observed a pan body structure……. On the following day the pan body structure was still there…A confusion started between the defendants' children and mine……"

In addition to the allegations of trespass there is conflicting evidence about the area or location that is said to have been trespassed on. Both parties are alleging trespass on their respective lands.

The Trial Judge, in the circumstances, rightly ordered the visit to the locus, which was to enable him to see the extent of the trespass physically on the ground and further enable him to clear the doubts that he felt arose from the evidence. In our view, he took the right step to order the visit; the issues which arose could only be resolved by such a visit.

Having established that the visit to the locus was necessary, it is for us to decide whether the procedure adopted by the Trial Judge in the instant case amount to a miscarriage of justice.

It has been held that a decision of a Trial Judge will not be set aside merely by reason of an incorrect procedure or because of an omission of a step in a number of steps to be taken during a visit to the locus in quo, unless it is established that a miscarriage of justice has been occasioned by the incorrect

procedure. **(See Akeredolu v Akinremi) 1989 3 NWLR (pt.164 at 174 P 153 para. A-B).**

The evidence adduced by the parties before the visit, was conflicting, so also were the Survey Plans, Exhibit "B" and Exhibit "D", which the Respondent and the Appellants' Surveyors tendered in evidence before the visit to the locus was undertaken by the Trial Judge. Since the conflicting pieces of evidence were already before the judge prior to the visit, it was perfectly in order for him to have ordered the visit to see things for himself. The only problem in this case, is that the Trial Judge did not attend the locus in quo.

What then is the implication of his absence from the locus in relation to the Report "Exh. E" which he accepted and evidence from his Registrar? Firstly, we believe that the Trial Judge deprived himself of seeing the extent of the alleged trespass physically on the ground, and secondly, he was unable to clear the doubts that arose from the conflicting evidence. He relied on his Registrar's record of the proceedings at the locus, without verification. This report was tendered as Exhibit "E".

Invariably, since the purpose of the visit is to avoid a miscarriage of justice, in this case it is our view, an essential problem here is whether a clear identification of the disputed area was given at the trial. The test, from a long line of cases, is whether a Surveyor could produce an accurate plan of the disputed area from the records, bearing in mind that at all times, that the Plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's title. The most pertinent requirement is for the piece of land claimed by each of the parties to be identified and their relative positions located; and these must of necessity turn to the evidence adduced by the parties at the trial, and what the Learned Judge observed at the locus.

The learned Judge went to an exceptional length in considering the evidence led by the two the Surveyors, Mr. Eric Forster for the Respondent and Mr. Alexander Coker for the Appellants, and their respective Reports.

In Exh."B" the Report of Mr. Eric Forster on the relative location of the alleged encroachment, he said:

> **"Particular attention was given to the COMMON BOUNDARY as the BEACONS established were shown to both parties and the Local Chief.**

It resulted that part of the pan body "shop" building attached to the building under construction in the compound of the Defendant encroached into the Property of FATMATA KARGBO"(Emphasis added.)

Earlier in his oral evidence he said:

".....Defendants structure encroached into the plaintiff's land. My plan does not indicate the kitchen."(See page 101)

Although Mr. Forster testified to the presence of a 'pan body shop' on the Respondent's land, under cross-examination, he stated:

"Defendants' structure encroached into the plaintiff's land. Plaintiff's kitchen was in dispute. Part of the kitchen is not in defendant's land."

Whereas Mr. Forster's report made reference to an encroachment of a "pan body shop", and later in cross-examination, he made reference to an encroachment by a kitchen, the Court Registrar's report Exh. "E" states:

"The only dispute is the location of the Kitchen".

That evidence is confirmed by the Respondent herself who said that the Kitchen was inside the Appellants' land. Her evidence is that the Appellants objected to the kitchen she built on their land.

The evidence was further confirmed by the evidence of DW3, who said that what was in dispute was a kitchen structure. The question then is - was there also a Shop on the disputed land?

The reference to a shop appears in the Judge's record of the Court Registrar's evidence in cross-examination, where in answer to questions from the Appellant's Counsel the Registrar is reported as saying, he said

".....he observed a beacon in front of the shop. There is a passage between the shop and the house. The beacon is in the middle." (See page 19). This witness also testified that **"no property of the defendant is in plaintiff's land".**

Under cross- examination the witness said the kitchen is at the back of the plaintiff's house, and the evidence of the Court Registrar put the shop on the passage between the front of the Appellants' house.

As I have stated earlier, the Court's visit to the locus should have helped in identifying the land of the various parties. Unfortunately, although the Registrar who took down the notes at the scene produced then, the notes and evidence were not helpful in identifying the land encroached on. Furthermore, there is nothing in the Records of proceedings to indicate that the witnesses who testified at the locus (if any) were called to give their evidence on oath when the Court resumed sittings.

As I have stated earlier in a claim for a declaration of title, it is of vital significance that there is certainty of the land in question as we have been reminded by both Counsel, the onus of establishing the identity of the subject matter in dispute lies on the party making the claim. The various ways of doing this, and the preferred and perhaps better way of proving the identity is by producing a Surveyor's Plan of the area being claimed, the plan should include the salient features and boundaries of the land being claimed and its relative position to the surrounding land and adjacent properties.

In the instant case the two surveyors produced conflicting plans even contradicting the evidence of their respective clients as I have already pointed out. The Learned Judge whose observation should have helped clear the uncertainties and conflict was not present at the locus, yet he placed considerable reliance on the Court Registrar's Report Exhibit "D". Therefore in our considered view, the Judge's failure to attend the locus in person in circumstances of this case occasioned a miscarriage of justice. The Trial Judge's reliance on the Registrar's Report alone to resolve the conflict was wrong and improper.

Having read the whole evidence of the witness and taking into consideration of the exhibits tendered, I am not convinced that the identity of the land encroached on has been properly identified.

In the circumstances, I will up hold the appeal to the extent that this matter be remitted to the High Court for rehearing. Each party is to bear his/her own costs.

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HON. MRS JUSTICE S. BASH-TAQI JSC

I AGREE.....

HON. MS. JUSTICE S. KOROMA JSC

I AGREE.....

HON. MR. JUSTICE E. E. ROBERTS JSC