CIV APP 49/2007

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: BISHOP J C HUMPER - APPELLANT

AND

MRS CLARA ROBBIN-COKER - RESPONDENT

CORAM:

THE HON MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HON MR JUSTICE E E ROBERTS - JUSTICE OF APPEAL

THE HON MR JUSTICE S A ADEMOSU - JUSTICE OF APPEAL

COUNSEL:

R A CAESAR ESQ for Appellant

R JOHNSON ESQ for Respondent

JUDGMENT DELIVERED THE 30th DAY OF JUNE,2011.

INTRODUCTION

1. This is an appeal brought by Retired Bishop Humper against the Judgment of SHOWERS,J (as she then was) dated 10 October,2007. In that Judgment, SHOWERS,JA found for the Respondent, then the Plaintiff. The Learned Judge Declared that the Respondent was the fee simple owner of all that piece or parcel of land situate lying and being at Old Railway Line, Wilberforce, Freetown more particularly delineated in survey plan LS1742/72, and as such, declared also that she was entitled to recover possession of that piece or parcel of land. She also granted an Injunction restraining the Appellant then Defendant, from entering or remaining on the land, and from selling or otherwise disposing of the same. She did not award Damages for Trespass, and as the Respondent has not cross-appealed on this point, I shall say no more about it. The Respondent was also awarded the Costs of the action.
2. The Appellant's grounds of appeal are to be found on pages 114-115 of the Record. His arguments in support of those grounds are to be found in the

document intitled "Appellant's skeletal arguments" filed by his Counsel, Mr Caesar on 11 June,2010. Skeletal, they are indeed; but 'arguments' I am not sure they are. They are merely descriptive statements of what transpired in the High Court, with an implied invitation extended to this Court to conclude, that in the result, the Appellant did not get justice in that Court, and must be given justice in this Court whatever the circumstances, because the house he has built, is his only place of abode. I can only say that if this Court were to act in accordance with such a principle, it would dispense injustice, instead of justice. This Court can only uphold an appeal where the points raised have merit, and warrant the over-turning of the decision of the Trial Judge. Further, Appellant's conduct itself, does him no credit: the points he now canvasses in this Court, were never even thought of, nor mentioned in passing in the High Court.

GROUNDS OF APPEAL - GROUND 1

3. The grounds of appeal, if I can summarise them, are as follows: Firstly, the Appellant contends that " *The Learned Trial Judge (LTJ) erred in Law and in fact when she made her findings and erroneously arrived at a conclusion without fully comprehending the provisions of the Conveyancing Act,1881 and the Vendor and Purchaser Act,1874, in that: (a) She confused the provisions of the said Acts by stating that the surveyor's findings must be accepted as proof of the Plaintiff's claim that the Defendant has trespassed on her land. (b) She misconstrued the said Acts when she held that "there is evidence that the land had been in the family of the Vendor of the Plaintiff's predecessors in title for a period prior to 1915 without any documentary evidence to that effect".* Regrettably, neither in the grounds of appeal, nor in his skeletal arguments, has Mr Caesar explained to this Court where the errors arise, or where, in the Record, it was clear, the LTJ had not comprehended the provisions of the two Acts he has referred to; nor where she is alleged to have confused the provisions of both Acts. For some inexplicable reason, Mr Caesar has not himself told us what these so-called 'confusing provisions' are. As far as my researches go, Section 1 of the 1874 Act provides that a good root of title is one which goes back at least 40 years, and not 60 years as was the case prior to that Act, save for those

cases 'in which earlier title than sixty years may now be required.' Section 2 deals with the obligations of the parties to the Deed of Conveyance or Lease. The rest of the Act has no bearing on this case. The 1881 Act is quite lengthy, but I see no provision in it which required the attention of the LTJ. Again, Mr Caesar has not helped us. He has not shown this Court where the LTJ's comprehension failed; or where she fell into confusion. For these reasons, this ground fails.

GROUND 2

4. Ground 2 is that "*The LTJ misdirected herself in Law and fact when she grossly failed to properly consider or consider the Appellant's defence and Counterclaim or consider them at all and instead opined that 'the surveyor's findings not having been controverted must be accepted as proof of the Plaintiff's claim' (page 5) when the surveyor was in the employ of the Plaintiff and only used the survey plan of the Plaintiff to arrive at his findings.*" What was the Appellant's Defence and Counterclaim, and how did he present and argue both in Court? An examination of what happened during the course of the trial will easily shed light on this issue. I shall therefore narrate briefly the course of events leading up to Judgment.
5. The Respondent issued her writ of summons against the Defendant on 27 November,2002. In it, she avers that she purchased the land situate at Old Railway Line, Wilberforce, Freetown from Isaac Emerson Davies in 2003 as evidenced by Deed of Conveyance dated 24 January,2003 and duly registered as No. 66/73 at page 128 in volume 257 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. It was tendered at the trial as exhibit A. The dimensions and area of the land are described in paragraph 1 of the Particulars of claim. She averred further, that when she visited the land in July,2002 she found a structure on it, and later found out that it was being erected by the Defendant. By letter dated 8 July,2002 the Appellant was informed that the land on which he was erecting a building, belonged to Plaintiff, and Plaintiff forwarded a copy of her conveyance under cover of that letter. The Defendant continued with his building works.
6. He entered appearance on 21 February,2003. He filed a Defence and Counter claim on 3 March,2003. In it, the Appellant avers that he bought

the land from Mohamed Gebara in 2001 and that his property is delineated in survey plan LS376/01. He averred further, that, "*.....his predecessor in title has been in possession for over 12 years without any interruption before passing over the same to the Defendant .*" That may be so. But if Mr Gebara had not done anything on the land between the time he purchased the same, and when he sold it to Appellant, it is unlikely the Respondent would have been alerted to his claim to the property. Respondent was obviously alerted because of the building works carried on by Appellant on the land. In his Counterclaim, Appellant merely repeated paragraphs 1-6 of his Defence, and prayed the Court for a Declaration that he was the fee simple owner of the property measuring 0.5898 acre delineated on survey plan LS 1376/2001. Nothing more was averred about the legitimacy of his claim to the property.

7. The case was assigned to the late RASCHID,J. On 23 October,2003 he Ordered that an Interim Injunction be granted against the Appellant, to stop him continuing with his acts of trespass on Respondent's land. Appellant applied for a discharge of that Injunction. He was refused by RASCHID,J on 31 October,2003. On 15 March,2004 RASCHID,J, by consent, granted the Respondent an Interlocutory Injunction in the same terms as that granted on 23 October,2003. The trial commenced before RASCHID,J on 30 June,2004. Mr Ekundayo Pratt from the Registry testified, and tendered in evidence the Deeds of conveyances of both parties as A and B respectively. The Respondent began giving evidence on 22 September,2004. She identified her property, and narrated how she found out that Appellant was constructing the building on her land. She tendered as exhibit C, the letter addressed by her then Solicitors to the Appellant, and the response given by Appellant's Solicitor, as D. Her Solicitors sent a rejoinder to exhibit D, which she tendered as exhibit E. She said, the Appellant did not respond positively to the suggestion made in exhibit E: He did not forward his conveyance to Respondent's Solicitors, nor did he consent to, or acceded in a joint survey being conducted on the land. Appellant merely continued with his building programme. In September,2003 she instructed her Surveyor, Mr Forster, who became PW3 to prepare an encroachment plan.
8. Mr Caesar's cross-examination of the Respondent occupies just 4 lines on page 87 of the Record. It is a confirmatian of the evidence given in chief.

There were several adjournment between March and October,2005. The reason for this was not stated by the late Judge. But on 12 October,2005 Mr Forster gave evidence as PW3. He said his services were hired by the Respondent, and that he carried them out. He carried out a survey of the land, and prepared a Report which he tendered as exhibit F. He identified the documents which had been given to him by the Respondent to carry out his work. They included exhibits A and B, and copies of the Deeds of Conveyances between Musa Abess and LAM Brewah (now deceased) and; between LAM Brewah and Mohamed Gebara. His Report included measurements taken at the site, and the observations he had made as regards Deed of Conveyance duly registered as No.332/51 at page 130 in volume 167 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. This deed dealt with two distinct plots of land: one measuring 6.8 town lots lying along Old Railway Line on the North; and the other measuring 1.56 town lots lying along the same Old Railway Line and being the property of Isaac Davies. According to PW3, this was the Isaac Davies, Respondent's Vendor. He concluded that "*the composite plan shows that the 2 properties are far apart; that the bigger plan of Rt Rev Dr J C Humper is enclosed within this high block wall fence in Jaffa's compound; property south of high wall is not Dr Reffell-Wyse. In brief, Plan of ...Dr Humper (LS1376/2001) is the same as that of LS plan in conveyance No.322/51 registered in volume 167 at page 130 .....From these for-goings I hereby conclude that the position now allocated for the Rt Rev Joseph C Humper is in the property of Mrs Clara Robbin-Coker which is incorrect and thereby had encroached.*"

9. I cannot say the Report is an exemplar of lucidity and clarity, but remarkably, Mr Caesar had no questions for him in cross-examination as appears in the Judge's minutes at page 92: "*Cross-examination by Caesar - None.*"
10. PW3 also said in examination-in-chief at page 92 also that "*.....My opinion is that the Defendant has left the area of 6.8 town lots which he paid for and went and constructed/occupied by just under two town lots the property of the plaintiff.*" Presented with this sort of evidence, unchallenged and uncontroverted, what was the LTJ expected to do? Professor CROSS has said in his seminal book, CROSS ON EVIDENCE that: "*the object of cross-examination is two-fold, first, to elicit*

information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly to cast doubt upon the accuracy of the evidence-in-chief given against such party." By failing or refusing to cross-examine PW3, the Appellant had acquiesced in all that he said in-chief. The Court will be bound by that evidence because there was nothing else to contradict it.

11. PW3's testimony ended on 7 December,2005. Between that date and 21 November,2006 the day before RASCHID,J died, no proceedings were taken. All we have were a series of adjournments. The reason for this long period of inertia becomes apparent when we examine the minutes made by SHOWERS,J on 16 February,2007 after the matter had been assigned to her for continuation: the parties were trying to negotiate a settlement. No settlement was reached and there was another flurry of adjournments, mostly at the instance of the Appellant or his Counsel. At a certain stage, D B Quee esq, stepped into Mr Caesar's shoes for a short while. Finally, on 6 July,2007 Mr Caesar threw in the towel as recorded on page 101 of SHOWERS'J's minutes: *"Mr Caesar – We are asking for time within which to arrive at an amicable settlement of the matter. The vacation is imminent and we ask that the vacation period be used to see if a consent judgment can be arrived at. In the circumstances, we do not wish to proceed with the defence."*

12. So the Appellant's Ground 2, likewise has no merit. Indeed, the surveyor's findings were not controverted, because there was nothing with which to controvert it. The LTJ was not expected to descend into the ring and rummage or go scurrying about looking for evidence to contradict the PW3's evidence. With respect, that was the duty of Counsel.

GROUND 3

13. I therefore move to Ground 3 which is that " *The LTJ erred in Law and fact when she failed to properly consider or consider at all the title deed of the defendant in respect of the predecessor's in title and instead erroneously held that "the plan of the defendant LS1376/61 is the same as that of LS322/51 which is the original plan of the land in dispute."* In fact, the LTJ did no such thing. An examination of the top of page 106 of the Record will show that she was quoting the evidence of PW3. Beginning

at the bottom of page 105, the LTJ said: "*He found out that the plan of the Defendant LS1376/2001 is the same as that of LS322/51 which is the original plan of the land in dispute.*" Through Counsel's acquiescence, that plan forms part of the record in the Court below, and in this Court. It is at page 135 of the Record. All that her Ladyship meant, in my respectful view, was that given this unchallenged piece of evidence that as far back as 1951 a survey plan prepared by one Mr Bickersteth had shown that the land which was eventually sold to the Appellant was to the right of that owned by Mr Isaac Davies, the Respondent's Vendor, and that both lands measured 6.8 town lots and 1.56 town lots respectively, it was not difficult to conclude that the Appellant had encroached upon Respondent's land. The encroachment plan on page 134 of the Record shows the location of both pieces of land. This plan shows that Dr Reffell-Wyse's property lies to the left of the Respondent's property, and that Jaffa's compound is to the right thereof. On the other hand, the Appellant's survey plan LS1376/2001 on page 123 shows that Dr Reffell-Wyse's property lies immediately to the left of Appellant's property. This shows that Respondent's property has been squeezed out in Appellant's survey plan. The Respondent did not lead evidence to prove that Mr Forster's measurements and conclusions were wrong or inaccurate. What the LTJ had before her was just that piece of evidence, and in my Judgment, she was entitled to rely on it entirely.

GROUND 4

14. In Ground 4, the Appellant contends that the LTJ offended the Audi Alterem Partem Rule, in that the Defendant was not heard in his defence; he was not given the opportunity to call witnesses. But since the Appellant has conceded in the rest of Ground 4 that "*....it was evident that the defendant did not intend to proceed with his defence the court acquiesced in the Plaintiff's request for the matter to be withdrawn for judgment on the evidence of the Plaintiff only before the Court*" I am of the view that he has himself dismissed his appeal. However, I would wish to correct an error there. It was not the Court which acquiesced; it was the Appellant who acquiesced as shown on page 101 of the Record. The Appellant simply did not wish to be heard. And as I have pointed out above, calling witnesses is not the only means of presenting a defence.

Effective, penetrating and intrusive cross-examination could do just as well. This is not a case in which the Defendant did not appear at the trial, and the Plaintiff was then allowed to prosecute his claim in the Defendant's absence. Here, the Defendant was present by his Counsel, and explicitly chose to say nothing in his defence. This Ground therefore fails also.

GROUNDS 5&6

15. In Ground 5 the Appellant contends that *"the LTJ confused herself with the Plaintiff's claim as in the endorsement for a Declaration that "she is the fee simple owner" with an action for a Declaration of title to land and thus miss-directed herself on the law governing "a Declaration for a fee simple owner as opposed to a mere declaration of title."* I am not sure I quite understand what the Appellant means. As far as I understand the Law relating to Land, and to Pleadings, a prayer that a Plaintiff be declared a fee simple owner of land, is the same as a prayer that the Court declare that the Plaintiff has title to the land claimed by her. I really cannot see the difference here. There is no confusion here. Perhaps there was in the mind of Counsel, bearing in mind the lost opportunity to cross-examine Mr Forster, and to lead evidence in rebuttal against that led by Respondent. I am satisfied in my mind that the Judgment is in accordance with the weight of the evidence led at the trial. Ground 6, therefore fails.

FINDINGS

16. Having read through the Judgment of SHOWERS,J I am more than satisfied that she gave Judgment according to the well-known principles of Land Law as laid down in the cases of SEYMOUR-WILSON v MUSA ABESS Sup Ct App \/79 and in ENGLAND v OFFICIAL ADMINISTRATOR [1964-66] ALR SL 315. The Plaintiff must rely on the strength of her own title, and not on the weakness of the Defendant's. There was sufficient proof, to the standard required by the Law that the Respondent's title and that of her predecessors-in-title stretched back to 1915. She was also able to prove at the trial the boundaries of her property. What it all came down to, according to the evidence of PW3 was that Respondent had built on land which he had not bought. It was not so

much a defect in his title, as a defect in the survey which had been carried out for him. His land, according to PW3 is located some distance away from that owned by the Respondent. The fault lies with his surveyor.

17. I will just touch on one matter referred to by my Learned Brother, ADEMOSU,JA at the beginning of page 2 of his Judgment. There, he refers to Rule 9(2) of this Court's Rules of 1985. Mr Caesar has grossly contravened that Rule. No particulars of mis-directions and of errors have been given by him. On that ground alone, the Appellant's appeal ought to have been dismissed, but I have taken the pains of going through all of the grounds presented, in order to show that the Appeal really has no merit.
18. I would also say for the record that I have not been swayed by the addendum submitted to us by Mr Caesar on 6 July,2010. Dismissal of the appeal does not stop his client from continuing to implore the Appellant to accept a settlement without enforcing the Judgment of the Court below. What we have done, is to establish that the Respondent is in the right as far as the facts of this case, and the law, are concerned.

CONCLUSION

19. I would therefore dismiss the Appellant's appeal, and affirm the Judgment of SHOWERS,J. The Appellant shall have the Costs of this Appeal and of the Court below.
20. I wish also to deal with the issue of Appellant's Counterclaim. It was not dismissed by the LTJ, though by implication it may be taken as having been dismissed, as no finding in favour of the Appellant was made by the LTJ. Further, as I have pointed above the Respondent has not cross-appealed, nor has she appealed against the failure to make such a finding. But I am of the view, that Rule 32 of this Court's Rules of 1985 empower this Court to make a finding where the circumstances of the case so warrant. Rule 32 states that: "*The Court shall have power to give any judgement and make any Order that ought to have been made, and to make such further or other Order as the case may require, including an Order as to Costs. These powers may be exercised by the Court notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour*

of all or any of the Respondents or parties although such respondents or parties may not have appealed from or complained of the decision." No evidence was led in support of the Appellant's Counterclaim, whether by cross-examination of the Respondent's witnesses, nor by the calling of witnesses, or the tendering of documents. I would therefore DIRECT that the Appellant's Counterclaim filed together with his Defence on 3 March,2003 be Dismissed without Costs, and that the same be entered in the Record of the High Court.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, Justice of Appeal

THE HONOURABLE MR JUSTICE E E ROBERTS

THE HONOURABLE MR JUSTICE S A ADEMOSU