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CIV APP 17/2007

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ABRAHAM WILLIAMS

- APPELLANT

AND

WAHID HELAL KANGE

- RESPONDENT

COUNSEL:

A E MANLY-SPAIN ESQ for the Appellant

MS V SOLOMON for the Respondent

CORAM:

THE HONOURABLE MR JUSTICE S A ADEMOSU, JUSTICE OF APPEAL,  
(NOW DECEASED)

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

THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 21<sup>st</sup> DAY OF JUNE, 2013.

THE APPEAL

1. This is an appeal brought by way of Notice of Appeal dated purportedly 24 April, 2007 but filed on 22 May, 2007 by the Appellant, Abraham Williams, against a Judgment of the High Court, SHOWERS, J presiding, dated 20 April, 2007.
2. The Grounds of Appeal are as follows:
  - i. That the Learned Trial Judge was wrong in Law and on the facts to have entered judgment granting the Respondent, a declaration that the piece or parcel of land claimed by the Respondent is the property of the Respondent.
  - ii. That the Learned Trial Judge was wrong in Law to grant an order for recovery of possession, Damages, injunction and costs to the Respondent.
  - iii. That the Learned Trial Judge failed to consider or consider properly the evidence in favour of the Defendant in particular when the Learned Trial Judge held that the Appellant had "failed to produce any title deed in his name" even though the Appellant had produced his father's title deeds registered in 1955.



iv. That the Judgment is against the weight of the evidence.

#### PROCEEDINGS IN THE HIGH COURT

3. By writ of summons dated 24 March, 2005 the Respondent instituted proceedings against the Appellant for a Declaration of title to property situate at Peninsula Road, Adonkia in the Western Area of Sierra Leone, measuring 1.0319 acre, the area and dimensions whereof are delineated in survey plan LS 1065/93 dated 8 June, 1993 drawn and attached to Deed of Conveyance dated 24 August, 1993 and duly registered as No. 774/93 at page 99 in volume 471 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown; Recovery of possession of the said land, Damages for Trespass, Damages for Malicious Damage in the sum of Le3million, an Injunction, Surveyor's Costs, Further of other relief, and the Costs of the action. The Respondent averred that between 2004 and 2005, the Appellant had been trespassing on his land. The matter was reported to the Police at a point in time. In 2005, the Appellant removed and damaged the Respondent's beacons, costing Le3million.
4. Appearance was entered on the Appellant's behalf by A M Musa esq on 1 April, 2005. On 14 April, 2005, Mr Musa filed a Defence and Counterclaim on behalf of the Appellant. The Appellant averred that his late father, Joshua Williams, was the owner of 6.6403 acres of land situate off Peninsula Road, Bango Farm. His father bought this property from one Donguema Williams in 1956, and his entitlement to the same was registered in Deed of Conveyance dated 25 August, 1956 and duly registered as No. 336/56 at page 37 in volume 182 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. Joshua Williams died intestate in 1959 and the Appellant was appointed Administrator of his estate. The Respondent was out of the jurisdiction for some years, and on his return in 2002, found out that the Respondent had been wrongfully occupying his deceased father's property. He therefore prayed, inter alia, in his Counterclaim, that this property be declared to be his, and that he do recover possession of the same. Issue was joined by Respondent's Solicitor on 19 April, 2005 though no defence to counterclaim was filed at the same time. This was later noted by the Learned Trial Judge, who applied corrective measures to this omission.



5. At the trial, which commenced before SHOWERS, J on 20 September, 2005, late Mr D B Quee, led Mr Musa for the Defence. The Respondent called 3 witnesses, viz: Mr Ekundayo Pratt, a representative of the Administrator and Registrar-General's Office as PW1; his father, Hilal Toufic Kange as PW2; and a Surveyor, Julius Saffa as PW3. PW1 tendered in evidence the Respondent's Deed of Conveyance dated 25 August, 1993 as exhibit A. PW2, Respondent's father testified that he bought the land from Christian Smith in 1993. He explained how he came to meet with the Appellant, and how eventually, his complaint about the Appellant's acts of trespass were dealt with by the Goderich Police. He tendered as exhibit B, a copy of a letter dated 15 July, 1994 from the LUC, S Division, Goderich to the Director of Surveys and Lands, explaining the Police's findings about the land in dispute. He asked for Damages in the sum of Le3m for the damaged beacons, and for the sum of Le1.5m in respect of surveyor's fees. PW3, the surveyor, Mr Saffa, says he replaced the beacons on the Respondent's land at a cost of Le1.5m. He said he carried out a survey of the land and also that he saw a pan-body structure on the land when he went there. Indications were made by PW1, and he took measurements.
6. The Defendant gave evidence himself as DW1, and called 3 witnesses. He said he was born in 1951. His late father acquired the property at Bango Farm. At a certain point in time, he must have left Sierra Leone, because at page 65 of the Record, he says he came back in 2004. It was then he discovered he saw a pan-body structure on his father's land. He was later informed that PW1 was laying claim to the property. He did not have any Deed of title in his name. The Grant made to him by the High Court of Sierra Leone in its Probate jurisdiction on 20 September, 2004 was tendered in evidence by DW2 as exhibit C. His father's conveyance was tendered as exhibit D. The surveyor, Sheriff Abass Kargbo, was DW4. He tendered in evidence his Report and composite plan, as exhibit E1&2 - pages 136-138 of the Record. One of his findings, as recorded at page 136, was that: *"....the Ministry made no provision to keep records for private surveys done before 1961 and as a result, there was no record kept in the Ministry for the survey plan of Mr Joshua Williams but the survey was recommended as authentic. The survey done for Mr Walid Helal Kange in 1993 was registered in the Ministry."* He concluded that



the survey done for the Respondent "....was done right inside Mr Joshua's survey plan...."

#### CHANGE OF SOLICITOR

7. On 16 May, 2007 after Judgment, Mr Manly-Spain was appointed Solicitor for the Appellant. The relevant Notices are at pages 47 and 48 of the Record. We note that in these Notices, Mr Quee is referred to by Mr Manly-Spain as the Appellant's Solicitor. He was not. There is no Notice of Change from Mr Musa to Mr Quee in the Record.

#### APPELLANT'S COMPLAINTS

##### HOW SHOULD TITLE BE PROVED?

8. The principal complaint made by the Appellant, is the manner in which the Learned Trial Judge treated the evidence in its entirety. It appears that what weighed in her Ladyship's mind, was the absence of any title deed in the name of the Appellant. She rightly quoted the approach the Court should take, as laid down by LIVESEY LUKE, CJ in Civ App 5/79 - SEYMOUR-WILSON v MUSA ABESS. What we understand her to have said and intended, was that the Respondent had established on a balance of probabilities that he had a better title to the property than the Appellant. She was not really transferring the burden of proof to the Appellant. The case law on this particular issue is that the party seeking a declaration of title to property must rely on the strength of his title, and not on the weakness of his opponent's title. In judging the strength of the title of the party seeking a declaration, the Court will obviously have to look at the merits of the other party's claim. Here was a case in which the Respondent had tendered in evidence a deed of conveyance incorporating a survey plan drawn in 1993. 11 years after, another party comes to town, and claims that he is the owner of the property because he believes that was property bought by his father in 1956. He said he was born on the land in 1951 and had lived there ever since, though later he says he came back in 2004. He did not say how long he had been away from Sierra Leone. It may be that his Counterclaim may have been statute-barred though this point was not canvassed by Respondent's Solicitor and Counsel. On his return to Freetown, he went to the land with



his mother and there was a pan-body on it. He does not say whether there was any structure on the land when he left Sierra Leone. His own surveyor-witness testified that the survey plan in his father's deed of conveyance was not registered in the Ministry of Lands - see page 136 of the Record. Based on evidence of this nature, the Learned Trial Judge rightly came to the conclusion that the Respondent had proved that he had a better title to the land than the Appellant. The Appellant could not really prove possession of the land, whilst the Respondent was able to do so through his father, PW2 who had put a caretaker, Solomon, in charge of the land - see page 55 of the Record.

9. We note that the Learned Trial Judge did say in her Judgment at page 91 of the Record, that because the Appellant had only tendered in evidence the Deed of conveyance in his late father's name, and the Grant made to him to administer his late father's estate, she regretted "*that those two documents can hardly suffice as proof of legal right to the said land.*" This is not quite true. The legal interest in the estate of a deceased intestate is vested in the Administrator, though other persons may be entitled to the beneficial interest in the same. The Administrator therefore stands in the place of the deceased intestate. The Court can make a declaration in favour of the Administrator that the legal estate in a piece of property is vested in that Administrator qua Administrator. That notwithstanding, we are of the opinion that the Appellant's surveyor-witness, PW4, had vitiated the import and effect of his own findings and Report, by admitting that he could find no record of the plan in the deceased intestate's Deed, in the Ministry of Lands. This piece of evidence rendered nugatory the Appellant's claim that he was the person entitled to the land claimed by the Plaintiff. We have noted the arguments canvassed by Mr Manly-Spain in his synopsis, when dealing with Ground 3 of his Grounds of Appeal. There is some truth in his argument that the Learned Trial Judge did not deal with DW4's evidence in detail. But as we have stated above, the absence of comment on his evidence did not affect the tenor and purport of the Judgment. The Report was in colloquial language, "spiked" by its author. If, as he, the said PW4 admitted, there was no record of the late Mr Williams's survey plan in the Ministry, how could he really tell whether what was recorded in the survey plan given to him by the Appellant, represented the true location



of the land it was claimed the deceased intestate had owned. At page 73 of the Record, under cross-examination, DW4 admitted that "*....there was no LS on Joshua Williams' plan.*" These were considerations which the Learned Trial Judge must have had in mind in arriving at her decision.

#### CLAIM FOR TRESPASS

10. As regards the claim for trespass, LIVESEY LUKE, CJ makes it clear in the SEYMOUR-WILSON case that what is at issue here, is the relative strengths of the contending parties' titles. The party who proves a better title, or, in the absence of that, a better right to possession, wins the day as it was that case. Mr Seymour-Wilson won on the issue of a declaration of Title, but Mr Abess won on the issue of Trespass. We think in this case, there was ample evidence that the Respondent had established that he had a better right to possession.

#### AWARD OF DAMAGES

11. We have looked carefully at Mr Manly-Spain's complaint that there was no evidence before the Learned Trial Judge to warrant the award made against the Appellant to pay Damages for Malicious Damage to the Beacons and to pay Damages for Trespass. The basis of these two awards is to be found in PW2's evidence at page 56 of the Record. There, he says: "*I do not know if the Defendant was trespassing on the land. There are 3 zinc structures on the land. They are constructed by purchasers of the Defendants. He sold part of my land to them. He sold the whole land to these 3 persons. I do not know if conveyances were prepared in respect of the sale of the land. ....I know Julius Saffa..... I paid Le1.5million. The beacons erected by Mr Saffa have been removed several times. The Defendant has been removing beacons from the land.*"
12. Though PW2 testified that the Appellant had removed beacons from the land, this allegation was not put to him when he testified in the witness box. In civil litigation, an accusation or allegation made in the pleadings must be put to the opposite party whilst that party is giving evidence, so that that party could either admit it, or deny it, or explain it away. This is particularly so, where there has been a general traverse as was the case here - see page 24 of the Record, paragraph 5 of the Appellant's Defence. There was no direct evidence that the beacons were damaged



by the Appellant, and there is no indirect evidence from which such an inference could be drawn. The Appellant could not therefore be held liable to reimburse the Respondent for money spent hiring Mr Saffa to replace the damaged beacons. Mr Manly-Spain was right in this respect, in his synopsis.

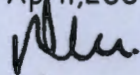
13. Further, the allegation that the Appellant had been selling land to third parties was never put to him while testifying. In fact, Respondent's Counsel's cross-examination was confined to the legal status of the Grant made to the Appellant. As we have stated above, the Appellant's status as Administrator of his late father's estate was irrelevant to the issue of a declaration of title. It was the duty of the Respondent to prove his case on the strength of his title, and not to rely on the weakness of the Appellant's title. As regards the award of Damages for Trespass, there is evidence from which it could be inferred that the Appellant did go onto the Respondent's land, apparently on the basis that it was his property.
14. As regards the Respondent's claim for Recovery of Possession and the claim for Damages for Trespass, these claims ought to have been granted by the Court below, otherwise the Judgment would have been meaningless as there was evidence of continuing acts of trespass which the Learned Trial Judge accepted and believed. There was a need also for an Injunction to be granted to prevent further acts of Trespass.

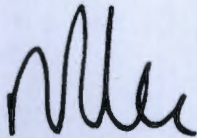
#### APPELLANT'S COUNTERCLAIM IN THE HIGH COURT

15. We now move on to the Appellant's Counterclaim. The Learned Trial Judge made no pronouncement on it, as she should have done, *moreso*, because no defence to that Counterclaim was filed on behalf of the Respondent. Rule 32 of the Court of Appeal Rules, 1985 empowers this Court "*to give any judgment and make any order that ought to have been made, and to make such further or other order as the case may require.....*" This provision empowers us to deal with the absence of any Order made as to the Appellant's Counterclaim. We believe the Counterclaim should have failed for the reasons given above: The Appellant had not been able to prove on a balance of probabilities that he had a better title to the land than the Respondent. We would therefore make an Order dismissing the Appellant's Counterclaim.

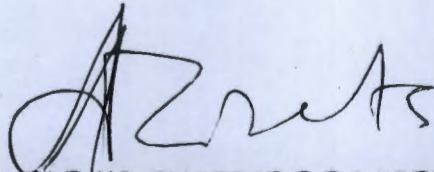


16. In the result, we would dismiss the Appellant's appeal, and in accordance with what we have said above, make the following Orders.

- i. The Appellant's appeal against the Judgment of the High Court, the Honourable Mrs Justice Showers Presiding, dated 20<sup>th</sup> April, 2007 is dismissed ~~with~~ subject to sub-paragraph ii below. 
- ii. The award of Damages for Malicious Damage in the sum of Le240,00 and of the sum of Le1,500,000 as surveyor's costs is set aside
- iii. We hereby affirm Orders numbered 1,2,3, 6 & 7 made by the Honourable Mrs Justice Showers in her said Judgment.
- iv. The Respondent shall have the Costs of this Appeal.



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



THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL.