

Rishi

CIV APP 16/2006

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

1. MOHAMED BUNDU
 2. PHILIP MANLY-SPAIN
- AND

- APPELLANTS

AGATHA VANDI (NEE KAITELL)
ADMINISTRATOR OF THE ESTATE OF
P B KAITELL (DECEASED) INTESTATE

- RESPONDENT

CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL
THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL THE
HONOURABLE MR JUSTICE A S FOFANAH, HIGH COURT JUDGE

COUNSEL:

A E MANLY-SPAIN ESQ for the 1st and 2nd Appellants
MS. M DUMBUYA for the Respondent

JUDGMENT DELIVERED THE 21st DAY OF JUNE, 2013

INTRODUCTION

1. This is an appeal brought by way of Notice of Appeal dated 22 February, 2006 brought by the 1st and 2nd Appellants, Mohamed Bundu, Philip F. V. Manly-Spain against the Judgment MASSALLY, J dated 17 February, 2006. The Director of Surveys and Lands, Ministry of Lands, Housing, Country Planning and the Environment who was the 3rd Defendant at the trial, did not participate in the trial, and did not appeal against the said Judgment. Even though in the Notice of Appeal filed, Mr Manly-Spain states that he is Solicitor for the Appellants, it is clear from the Record that he did not enter appearance for the 3rd Defendant, nor has he, in this Court, been appointed Solicitor for that Defendant. The appeal is therefore one between the two Appellants, and the Respondent.

ORDER FOR REPRESENTATION

2. We are also aware that the 2nd Appellant who was the brother of Counsel for the Appellants, has passed away. We shall therefore proceed, first to utilise the powers conferred on this Court by Rule 32 of the Court of Appeal Rules, 1985. The Administrator of the Estate of the late PHILIP F V MANLY-SPAIN shall be substituted for the 2nd Appellant as of today's date, pursuant to Rule 32 of the Court of Appeal Rules, 1985 and Order 18 Rule 7 of the High Court Rules, 2007. The Judgment shall therefore be served on the Administrator. Consequentially, the title in respect of the 2nd Appellant shall now read: "The Administrator of the estate of PHILIP F V MANLY-SPAIN, Deceased Intestate". If, of course, the deceased died testate, his Executor or Executors shall replace him, and the above direction shall apply to him or to them.

GROUND S OF APPEAL

3. Turning to the Grounds of Appeal, they are as follows:

- i. That the Learned Trial Judge was wrong in Law and on the facts to grant a declaration that the Plaintiff/Respondent is the fee simple owner and is entitled to possession of the land claimed by the Plaintiff/ Respondent, having regard to the fact that the Plaintiff/ Respondent sued as Administratrix of the estate of P B Kaitell and the fact that the land was never vested on the Plaintiff/ Respondent personally.
- ii. That the Learned Trial Judge failed to consider or consider properly the case for the Defendants/Appellants, particularly when he said as follows: "Since no evidence was led by DW1 Amadu AlimTuray the ex-Director of Surveys and Lands, and DW3 George Coker that the Lease granted to the 2nd Defendant exhibit "O" on plan (.....?) was subsisting or cancelled at the time of the conveyance of exhibit B1, I will draw the inference that the lease exhibit "O" had lapsed. This was the true position when the purchaser was negotiating with the Ministry of Surveys and Lands leading finally to the conveyance, exhibit "B1". The Lease to the 2nd Defendant exhibit "O", predated the conveyance of Mr P B Kaitell for 7 years. Within that period the 2nd Defendant could have developed (presumably, "the land") and a conveyance prepared in his favour by the Ministry of Surveys and Lands.

- iii. That by the said analysis, the Learned Trial Judge shifted the burden of proof from the Plaintiff to the 2nd Defendant to prove that the lease from the Government of Sierra Leone to the 2nd Defendant was in existence when the Conveyance was made by the Government of Sierra Leone to Peter B Kaitell.
 - iv. That the Learned Trial Judge erred in Law in dismissing the submission by Solicitor for the Defendants/Appellants that the Plaintiff ought to have complied with the provision of Order 5 Rule 9 of the High Court Rules as she was instituting the action as "Administratrix of the estate of P.B. Kaitell Deceased"; holding instead as follows: *"In any case Rule 2 of Order 50 of the High Court Rules 1960 set out how irregularity could be impugned. Further, Counsel had taken fresh steps in the proceedings and cannot now in this eleventh hour raise an objection on jurisdictional ground."*
 - v. That the Learned Trial Judge failed to consider the submission by Solicitor of the 2nd Defendant/Appellant that the Government of Sierra Leone did not have the right to sell to Peter Kaitell the land already leased by the Government of Sierra Leone to the 2nd Defendant/Appellant or that such a sale ought to be subject to the lease of the 2nd Defendant/Appellant.
 - vi. That the Learned Trial Judge erred in law and also misquoted and misinterpreted the evidence as to the State of the land of (at) the time the land was purportedly sold to the said Peter Kaitell when he said, *"the other point raised by Mr A E Manly-Spain that the purchaser had notice of the interest of the 2nd Defendant because of a pan body structure on the land."* No inquiry was made as there was nothing on the land at the material time. In fact exhibit D (shows) that the land was vacant at the time the deceased intestate was negotiating the purchase of the land from the Government of Sierra Leone.
 - vii. That the judgment is against the weight of the evidence.
4. The Relief sought by the Appellants, is that the entire Judgment dated 17 February, 2006 be set aside and that the Respondent do pay the Costs of the appeal.

5. In order to deal adequately with this appeal, we believe it is necessary to set the facts of the case, and the manner in which the trial was conducted.

FACTS OF THE CASE AND PROCEEDINGS AT TRIAL

6. By writ of summons dated 14 October, 1999 the Respondent, then Agatha Kaitell brought action against the 1st Appellant herein, only. She brought it in her capacity as Administratrix of the estate of P B Kaitell. In the writ, she averred that she had brought the action on behalf of the estate, the deceased P B Kaitell having died intestate in Freetown on 11 January, 1997. At the time of his death, the deceased was the owner of the property situate lying and being at Spur Road, Wilberforce, delineated in survey plan LOA 3125 drawn and attached to Deed of Conveyance dated 28 March, 1996 and duly registered as No. 492/96 at page 90 in volume 495 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. Letters of Administration were granted to her by the High Court of Sierra Leon in its Probate jurisdiction on 12 May, 1998 (not 1995 as appears in the writ). The complaint, then, was that the 1st Appellant had been trespassing on the deceased's property. The Respondent therefore prayed the Court to Declare that "the estate of deceased is entitled to the fee simple estate in possession of all that piece or parcel of land situate lying and being at Spur Road, Freetown"
7. On 22 December, 1999 Plaintiff's Solicitors entered the action for trial. Much later, on 10 February, 2000, Mr Manly-Spain entered appearance for the 1st Appellant. By Notice of Motion dated 5 December, 2000 Plaintiff's Solicitors applied to join the 2nd Appellant as Defendant. By Order dated 13 December, 2000, MASSALLAY, J granted Leave to the Plaintiff, to join the 2nd Appellant as Defendant. In the amended writ, it was averred that the 2nd Appellant had been unlawfully laying claim to the land in question, prior to the death of the deceased, and that he had authorised the 1st Appellant to occupy the land as his caretaker.
8. On 29 January, 2001 Mr Manly-Spain filed a Defence and Counterclaim dated 24 January, 2001 on behalf of the 1st and 2nd Appellants. In it, they averred that the 2nd Defendant had been in occupation of a portion of the land measuring 0.1010 acre, since 1989 which said land had been

developed by him. 2nd Defendant also averred that he had been in lawful possession of the land delineated in survey plan LOA 3125. We must point out that by this date, the trial had commenced before MASSALLAY, J on 17 November, 2000. During the first two hearings, two witnesses on behalf of the Respondent tendered in evidence the Deed of Conveyance dated 8 February, 1939 between Hannah Williams and the deceased, and the Deed of Conveyance dated 28 March, 1996 between the Government of Sierra Leone and the deceased; and also, the Letters of Administration granted to the Plaintiff on 12 May, 1998. It was after these two witnesses had testified, that 2nd Appellant was joined as a party to the proceedings, though it had been noted by the Learned Trial Judge since the first hearing, as appears on page 79 of the Record, that Mr Manly-Spain was Counsel for the 1st Appellant.

9. By Notice of Motion dated 6 February, 2001, the Respondent applied to the Court for the Director of Surveys and Lands to be joined as 3rd Defendant. The reason for this was that the Appellant had discovered that certain persons purporting to be acting on the authority of the Director, had been preventing the Respondent from developing the adjacent portion of land which was not in dispute. The Order for joinder was made by MASSALLAY, J on 9 February, 2001.
10. The Director of Surveys and Lands did not enter appearance to the writ of summons, nor did he file a Defence to the Plaintiff's claim in that writ.

APPELLANT'S EVIDENCE AT THE TRIAL

11. The Respondent herself gave evidence as PW3 on 31 January, 2001. She said that her father P B Kaitell died on 11 January, 1998 and that she had obtained a Grant to administer his estate. She said also that by the Deed dated 8 February, 1939, exhibit A, her great-grandmother, Hannah Williams, conveyed the land at Spur Road, to her grandfather, Eugene Kaitell. Her grandfather sold a portion to the Government for the purpose of building quarters. Her father wrote to the Government by letter dated 4 March, 1992 to the Minister of Lands - exhibit D, reiterating his claim to the undeveloped portion of the land. There was further correspondence between the Ministry and PW3's father, exhibited as E, F & G. In exhibit G, the Director of Surveys and Lands, Mr Sylvanus Lusanie, conveyed the then Secretary of State's approval for PW1's

father to purchase the land in question for the sum of Le2,250,000. By letter dated 20 March,1996, exhibit H, PW1's father accepted the offer and promptly paid the sum requested. A receipt dated 20 March,1996, exhibit J, was issued to him. After this payment, the Deed of Conveyance dated 28March,1996, exhibit B, was prepared, duly executed by the then Minister, the late Alfred Akibo-Betts, and then duly registered.

12. Problems arose with the 1st Appellant just before the death of her father who got his Solicitors to address the letter dated 11 December,1996 to him, exhibit L. Another letter was addressed to him on the same issue on 16 June,1999 - exhibit M. Additional problems arose in 1999 after her father's. She got her father's Solicitors to address a letter dated 11 Janaury,2001 - exhibit N to the then Vice-President who was also in charge of the Ministry of Lands. She also confirmed while being cross-examined by Mr Manly-Spain that she had found 1st Appellant on her father's land.

13. Her surveyor, the late B A Thomas testified as PW4 and tendered in evidence as exhibit O, a copy of survey plan LOA 1867 dated 15 December,1989 in the name of the 2nd Appellant. Clearly, this plan predated the plan in exhibit B. We do not think that there is any doubt that the land delineated in exhibit O, was eventually included in the survey plan in exhibit B. But the matter does not end there., as we shall shortly show.

CASE FOR APPELLANTS

14. The Defence opened, and called a former acting Director of Survey and Lands, Mr Alim Turay, to the witness stand. He explained the process for obtaining a lease of State land, but he could not tell whether a lease was indeed granted to 2nd Appellant. Under cross-examination, he confirmed that no Deed of Conveyance was executed in favour of 2nd Appellant. The second defence witness, DW2, was the 1st Appellant. He explained how he became care-taker of the 2nd Appellant's land but did not, and could not have said, much more. Another witness, John Coker, DW3 was called. He was asked to produce the file containing the papers relating to the offer of a lease made to 2nd Appellant; and under cross-examination, he explained the conditions on which such an offer was made. These conditions are fully out in the offer letter at page 63 of the Record,

which surprisingly, was not tendered in evidence during the course of the trial, by the Appellants. It was only exhibited to the Application for a Stay of execution of the Judgment of the Court.

15. Under re-examination, DW3 said that the offer could be terminated by letter. Here, testimony ended. 2ND Appellant, now deceased, did not testify at the trial. No explanation was given for his absence.

APPELLANTS' COUNSEL SYNOPSIS

GROUND 4

16. When the appeal came before us, Counsel were requested to file synopsis of their arguments. In his synopsis dated 4 February, 2009, Mr Manly-Spain appears to have abandoned *Ground 4* of his Grounds of Appeal which related to what he said was a violation or contravention of Order 5 Rule 9 of the then High Court Rules, 1960. We have gone through those Rules, and we cannot find any Rule 9 in Order 5. It is possible that Mr Manly-Spain was in error here; but we think that that point was adequately dealt with by the Learned Trial Judge. He was of the view, and we entirely agree with him, that that was a matter which could have been brought up by Mr Manly-Spain before filing a Defence and Counterclaim, and before going on to participate fully at the trial. He had taken fresh steps after gaining knowledge of the purported irregularity, and as, the Learned Trial Judge put it at page 121 of the Record, "*Counsel.....cannot now in this eleventh hour raise an objection on jurisdictional ground.*" It was not such an irregularity which would render the proceedings void ab initio, or otherwise. We are satisfied that it was clear from the beginning that the action was brought by the Plaintiff in her capacity as Administratrix of her late father's estate.

GROUND 1

17. In *Ground 1*, the complaint is that the Learned Trial Judge ought not to have adjudged that the Respondent was the fee simple owner and the person entitled to the land in question because she brought the action in a representative capacity. As Administratrix of her late father's estate, the legal estate of his entire estate vests in her. This is the effect of the Grant made to her by the High Court of Sierra Leone in its Probate

jurisdiction. The applicable legislation at the time was still, the Administration of Estates Act, Chapter 45 of the Laws of Sierra Leone, 1960 as amended by Act No 29 of 1972. Sub-Section 9(1) thereof provides that: "*The estate of every person dying intestate after the date of the operation of this Act shall devolve upon the Administrator and Registrar-General: Provided that, upon the grant of letters of administration under the provisions of this Act, the estate shall be divested from the Administrator and Registrar-General and be vested in the person or persons to whom letters of administration have been granted as aforesaid.*" The Respondent therefore holds the legal interest in the property on trust for the beneficiaries of the deceased intestate's estate. The Learned Trial Judge was therefore right to adjudge that she was the fee simple owner of the property. That Ground therefore fails.

GROUNDS 2, 3 & 5

18. *Grounds 2, 3 & 5* of the Grounds of Appeal ought to be taken together, as it appears the gravamen of the complaint is that the Learned Trial Judge shifted the burden of proof as a result of what he is quoted as having said in Ground 2. In effect, the Appellants are arguing that in saying that the Defence had not led any evidence to show that the Lease claimed by the 2nd Appellant was still subsisting at the time the Conveyance was executed in favour of the Respondent's father, the Learned Trial Judge had shifted the burden of proof as to facts in issue onto the Appellants, which he ought not to have done. The facts in issue were whether there was a subsisting lease at the time the deed of conveyance was executed in favour of the Respondent's father; and whether the Government had a right to sell property which it had already leased to the 2nd Appellant, to the Respondent's father; and if it did so, whether such sale ought not to be held to be subject to the existing lease.

REQUIREMENTS FOR A LEASE

19. The difficulty with this line of argument is that it pre-supposes the existence of a proper and genuine lease. There is no doubt that exhibit "O" states that State land situate at Spur Road, Wilberforce was leased to the 2nd Appellant. Exhibit "O" is dated 15 December, 1989. But it is not the offer of a lease, nor is it the lease. A survey plan, does not by itself

confer title to land. As we have pointed out above, for some inexplicable reason, Mr Manly—Spain did not see it fit to tender in evidence the letter of offer made to the 2nd Defendant. Without such a letter in evidence, it defies logic that the Appellants felt they had still made a case which merited serious consideration by the Court below.

20. Further, there is no Deed of Lease in existence to support the 2nd Appellant's claim. In our view, a lot of attention was paid by both Counsel and the Learned Trial Judge to matters which were not crucial to the determination of the action. It is trite Law, that the purchaser of the fee simple estate in any property takes the freehold, subject to any existing leases. But was there a Lease in this case? There may have been an offer of a Lease; but there certainly was no Lease in existence. The Rule in WALSH v LONSDALE (1882) 1 Ch.D 9 is of no help in this case. That Rule applies where the lessee is seeking an Order of Specific Performance from the Court against the Grantor of a Lease; that case decided that, quoting MEGARRY & WADE 4th Edition page 625: "*...Where there is a yearly tenancy at common law but a tenancy for years in equity, both parties can insist on their equitable rights against one another and that these prevail over their legal rights.*" In other words, in the eyes of Equity, an agreement for a Lease is as good as a Lease itself, where the lessee sought to take advantage of the absence of a Deed to argue that the Lessor could not Distrain for rent. Here, the situation is quite different. Here, the Grantor has impliedly revoked its offer, and granted a larger estate encompassing the same land, to another person. No action has been brought by the 2nd Appellant against the Grantor for what might appear to be at first sight, a Derogation from Grant. In order to annul or to curtail the Grant made to the Respondent's deceased father, the Appellants would have had to first obtain an Order of Specific Performance from the Court, compelling the Government of Sierra Leone to execute a Deed of Lease in favour of the 2nd Appellant.

21. Since the Statute of Frauds and the Real Property Act, 1845 a lease for a term of years has to be granted by Deed. Section 1 of the Statute of Frauds, 1677 required Leases to be in writing. Section 3 of the 1845 Act provides that: "*ALease required in Law to be in writing.....made after the said first day of October, 1845, shall also be void at Law, unless made by deed.....*" The position has been strengthened by our own local

legislation, the Registration of Instruments Act, Chapter 256 of the Laws of Sierra Leone, 1960 as amended by Act No. 6 of 1964. Every such Deed must be registered. Section 4 thereof provides that: *"Every deed, contract, conveyance, executed after the 1st day of June, 1964, shall be void, so far as regards any land to be thereby affected, unless it is registered within the appropriate period limited for such registration....."*

DR RENNER-THOMAS has in his leading text LAND LAW IN SIERRA LEONE, 2010 explained at page 93 thereof, the effects of all three statutes. There, he said: *"The Courts of Sierra Leone have consistently held that both these statutes (i.e. The Statute of Frauds and the Law of Real Property Act, 1845) are of general application and therefore received into Sierra Leone and have applied the provisions referred to above in a long line of cases."* He goes on to explain further down the same page, how, in the absence of a Deed, the transaction could be treated in equity as a contract for a lease provided certain conditions are met. We note of course, that Dr Renner-Thomas was at one stage, Counsel for the Respondent in the Court below.

22. Here, the 2nd Appellant had no Deed executed in his favour. Exhibit "O" was quite insufficient to confer a grant for whatever limited period on him. Arguments about the acreage of the land; whether the land conveyed to the Respondent's father encompassed that 'leased' to the 2nd Appellant, are of no moment: There is no enforceable Lease in existence between the Government of Sierra Leone and the 2nd Respondent.

GROUND 5

23. Ground 5 deals with alleged discrepancies in the manner in which the Learned Trial Judge treated evidence relating to the existence of structures on the land delineated in exhibit "O". As we have tried to point out above, whether or not Respondent's father had notice of 2nd Appellant's interest in the land granted to him, is of little moment. There was some argument in the Court below about the existence of structures on land at the time it was conveyed to the Respondent's father, and that this must have alerted Respondent's deceased father to the fact that some other person had possession of, or owned some part of the land conveyed to him. But because of the view we have taken of the legal

issues involved, we do not believe it would serve any useful purpose to venture an opinion on this matter.

24. Section 3 of the State Lands Act, 1960 as amended by Act No. 37 of 1961 provides as follows: "*The Minister may make grants of State Lands in such manner and subject to such conditions as may be required and as he may deem proper.*" "Grant" is defined in Section 2 of the Act as follows: "*Grant means (a) any grant for an estate in fee simple; (b) any lease.....*" Section 3 of the Real Property Act, 1845 which still applies in Sierra Leone, states that all Leases shall be by Deed. And Section 4 of the Registration of Instruments Act provides that all such Deeds must be registered. Section 28 of the Interpretation Act, 1971 provides that: "*Where an Act confers power to grant or issue any authorisation, certificate, licence or permit, or give any direction, unless, the contrary intention appears, the power includes power to revoke suspend or amend the authorisation, certificate, licence, permit or direction.*" The State Lands Act conferred power on the Minister of Lands to make a grant of land. Such a grant could likewise be revoked by him. Even if we were to accept, which we do not for the reasons stated above, that the Minister of Lands at the time, had made a grant to the 2nd Appellant, it was impliedly revoked by his successor in office by Deed dated 28 March, 1996. There is no other Deed in existence to counter or, to derogate from the Grant made to the Respondent's late father.

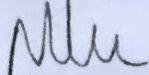
GROUND 6

25. Ground 6, is not very clear, but we have tried to make sense out of it. It appears, words have been left out which render it somewhat unintelligible. However, it seems that the Appellants were here flogging the same dead horse: the state of occupancy of the land at the time it was conveyed to Respondent's deceased father. Notice does matter, where there are two Deeds to consider; or, where there has been part or full performance on the part of a party, and another party has bought the same property without enquiring about third party rights. This was the situation in Civ App 50/2007 - AHMED v BAH where in delivering the Judgment of the Court, I explained what Notice as defined in Sub-Section 3(1) of the Conveyancing and Law of Property Act, 1882 (which is part of the adopted Law of Sierra Leone by virtue of the Schedule to Chapter 18 of the Laws

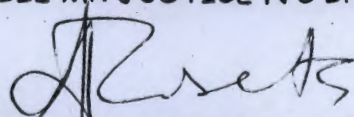
of Sierra Leone, 1960) entailed. The issue does not really arise on the facts of this case. Ironically, Mr Manly-Spain has not been able to explain in this Court, and in the Court below, why it is the 2nd Appellant, since deceased also, could not provide copies of the documents which DW3 claimed had gone missing in the Ministry of Lands. As such, there was no evidence as to whether 2nd Appellant paid any rent to the Government. So, the Learned Trial Judge, was not presented with any proof of 2nd Appellant's right to the property, other than exhibit "O", the survey plan. Of course, we are aware that it is for the Plaintiff at such a trial to prove his or her title. It is settled law that the Plaintiff cannot rely on the weakness of a Defendant's title in order to succeed. There is no argument in this appeal as to who was the owner of the property. The argument is as to whether the owner had the right to convey property to the Respondent's deceased's father, part of which it had purportedly leased to 2nd Appellant. As we have repeatedly said above, there was no proper Lease to the 2nd Appellant. Even if there had been one, it was never tendered in evidence at the trial. We are satisfied that by making the Grant to the Respondent's father by Deed dated 28 March, 1996, the Government of Sierra Leone, through the then Minister of Lands, had impliedly revoked any offer of a Lease it had made to the 2nd Appellant. This ground therefore fails as well.

CONCLUSION

26. In the result, the Appellants joint appeal is dismissed, and we affirm the judgment of MASSALLAY, J delivered on 17 February, 2006. The Respondent shall have the Costs of this appeal, and the Costs awarded in the Court below.



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



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

THE HONOURABLE MR JUSTICE A S FOFANAH, HIGH COURT JUDGE

