CIV APP 39/2009

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

RONALD LISK CAREW - APPELLANT

AND

ALIMAMY SAMUEL BANGURA - RESPONDENT

CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT

COUNSEL:
E E C SHEARS-MOSES ESQ for the Appellant
M P FOFANAH ESQ for the Respondent

JUDGMENT DELIVERED THE 28th DAY OF ~~MARCH~~ July 2016.

THE APPEAL

1. This is an appeal brought by the Appellant, Mr Ronald Lisk- Carew, by way of Notice of Appeal filed on 3rd November,2009 against the Judgment of KONOYIMA, J dated 8th October,2009. The Notice of Appeal is at pages 240 - 242 of the Record. Hereafter, references to page numbers shall be references to pages in the Record.
2. The grounds of appeal are at the said pages 240 to 242, and are as follows:
   (1) The Learned Trial Judge erred in law and in fact and consequently misdirected himself in arriving at the erroneous conclusion that the Respondent's daughter Fatmata B Bangura, who is not a party to the proceedings in the High Court and was never directed to be added as such, neither on application by Counsel nor by the Court "suo motto", *"is the fee simple owner entitled to possession and*

ownership of all that piece or parcel of land situate, lying and being at No. 5 Barracks Road, Murray Town, Freetown in the Western Area of the Republic of Sierra Leone, by virtue of a deed of gift dated 27th August,2008, registered with the office of the Registrar-General in Freetown."

The Rule of Law strongly favours the point that a person, who is not a party to the proceedings cannot benefit from the fruit thereby. That the Learned Trial Judge seriously misdirected himself on this vital point of law.

(2) The Learned Trial Judge erred in law in adjudging in favour of the Respondent even though he did not counter-claim for any reliefs; bearing in mind the principle of law that a party stands or falls by his pleadings.

PARTICULARS

When the Judge says, "*.....I will hold for the Defendant in this action.....That the Defendant's daughter Fatmata B Bangura is the fee simple owner entitled to possession and ownership of all that piece or parcel of land situate, lying and being at No. 5 Barracks Road Murray Town, Freetown aforesaid...*"

That the Plaintiff, his servants, relations, agents, heirs, administrators, trustees and/or privies are restrained perpetually from entering upon or interfering with the land at No. 5 Barracks Road, Murray Town, Freetown in the Western Area of the Republic of Sierra Leone.

(3) The Learned Trial Judge erred in law and fact and consequently failed to consider the issue of recovery of possession claimed by the appellant as being distinct from a declaration of title; never claimed or alleged by either party to the proceedings, but which forms (sic) the basis of his Judgment.

PARTICULARS

When the Judge said: "*.... The main question I have to decide is this - whether the Plaintiff has satisfactorily proved his title to the land i.e. No. 5 Barracks Road, Murray Town, Freetown....*

The Defendant through or by himself and his witnesses have produced no documents of title to the land, rather seeks to establish his title through his land (sic) and undisturbed possession of the land to the exclusion of everyone from 1955 to 2006.... To my mind the Defendant's over 50 years of undisturbed stay on that

land has enabled him to establish a possessory title to the land in issue within the full meaning and limits of the Statute of Limitation of 1961."

(4) The Learned Trial Judge erred in law and in fact in failing to consider throughout his judgment that the main claim of the Appellant is that the Respondent is and was at all material times to the action his tenant, who has been paying rent to the (Appellant's) then Solicitor, Dr Marcus-Jones, and for which payment receipts were issued to the Respondent by Dr Marcus-Jones. Instead the Learned Trial Judge strenuously tried to establish the Respondent's purported possessory title, in a case where the Appellant has although (sic) not claimed a declaration of title, shown good root of title by way of documents the last of which was signed by the Administrator-General.

(5) That in determining the issue of title to the said land, the Learned Trial Judge did not advert his mind to the maxim that he who is first in time is stronger in law and the provisions of Section 4(1) of Cap 256 of the Laws of Sierra Leone,1960 as amended.

(6) The Learned Trial Judge misdirected himself in ordering that the Appellant bear the costs of the action, which action was never decided on the weight of the evidence before the Trial Judge but which is based on some seriously extraneous claims that reach (sic) the Judge and persuaded him to hold for a party who is not claiming any relief in Court in respect of the land, subject matter of the action and who has not stated before the Court that she is so interested in same even though the said Fatmata B Bangura was a witness for the Respondent.

(7) That the Learned Trial Judge misconstrued the facts of the case and by deciding in favour of a party who is not party to the proceedings.

(8) That the Learned Trial Judge misconstrued the Appellant's claim and went against the weight of the evidence before the Court.

(9) That the Learned Trial Judge erred in law and fact in dismissing the Appellant's claim.

3. The relief sought from this Court are that;

(a) The Judgment of the High Court delivered by KONOYIMA, J on 8th October,2009 be set aside, and judgment accordingly be

entered in favour of the Appellant as per his claim in the writ of summons dated 19th June,2006.

(b) Any further order or orders that this Court may deem fit and just.

(c) Costs.

ARGUMENTS OF COUNSEL

A. MR SHEARS-MOSES for the Appellant

4. At the hearing of the appeal, Counsel on both sides filed written arguments in support of, and against the appeal, respectively. In his written arguments, Counsel for the Appellant, Mr Shears-Moses argued that Fatmata Bangura, the Respondent's daughter, could not benefit from the judgment as she was not a party to the litigation. Another argument canvassed by him, was that parties are bound by their pleadings; and that since the Respondent had not filed a counterclaim, no reliefs ought to have been granted to him, or to anyone else, purporting to derive title from him. A third argument was that what went before the Learned Trial Judge, was an action for recovery of possession, rather than one for a declaration of title to land. He emphasised that it was rather odd for the Learned Trial Judge to decide on the question of the Appellant's title to the property in dispute, when he had himself prepared the Appellant's deed of conveyance. He must also have been privy to the contents of a file which contained a letter dated 23 April,1990 – page 208 of the Record - written by Dr Marcus-Jones, then acting on behalf of the children of the deceased Esther Lisk Carew, of which the Appellant was one, to the Administrator and Registrar-General at the time. He argued that the Learned Trial Judge should have focused on the issue of receipts issued by Dr Marcus-Jones to the Respondent as proof of a landlord/tenant relationship. The fifth argument was that the Appellant's vesting assent, prepared by the Learned Trial Judge on 30 May,2007 ought to have taken precedence over the Respondent's deed of voluntary conveyance executed in favour of his daughter on 16 May,2008. The sixth argument was that the Court below ought not to have awarded Costs to the Respondent, as that Court had not properly adjudicated on the matter before it. The last contention was that the Learned Trial Judge wrongly dismissed the Appellant's claim.

B – MR FOFANAH'S ARGUMENTS

5. In his written submission, Mr Fofanah argued as follows: it was conceded that Fatmata Bangura was not a party to the action in the Court below; but the existence of the Deed of voluntary conveyance made in her favour was well known to the Appellant and his Solicitors whilst the case was pending in Court: it formed part of the Respondent's Court Bundle at the trial. The Respondent had also in his statement of defence categorically denied the existence of a landlord/tenant relationship between himself and the Appellant. Further Fatmata Bangura was a witness for the defence at the trial, and she was cross-examined by Counsel for the Appellant. In making a declaration in favour of Madam Bangura, the Learned Trial Judge was only following up on his decision to dismiss the Appellant's claim.
6. Another important point canvassed by Mr Fofanah, was that this issue of whether the Learned Trial Judge was right to have made a declaration in favour of Madam Bangura ought not to be entertained in this Court as it was not raised in the Court below. The short answer to this argument is that it was not an issue which arose in the course of the trial: it was an issue which arose in the Learned Trial Judge's judgment. It was he who gave judgment in favour of a non-party.
7. I have myself done so in a particular case at first instance in which I thought the justice of the case demanded that I make such an order. It was a case also in which the non-party was a beneficiary of the estate of the deceased who had died leaving a will, and whose will and estate constituted the subject matter of the litigation, and in which she also gave evidence. It is now the subject matter of an appeal, and I shall therefore make no further comment about it. But the difference between that case and this appeal is that in that case, the non-party was a daughter of the deceased testate, and she was also a beneficiary under the terms of the will, the contents of which were in dispute. What I did was to declare the will invalid, declare that the deceased in that case therefore died intestate, and to distribute his property in accordance with the provisions of the Devolution of Estate Act,2007.
8. In this appeal, no claim of whatever nature had been made on behalf of Madam Bangura. I do not think therefore that Mr Fofanah is right in arguing further, as he has done in sub-paragraph 2(v) of his written submission that issue estoppel arises. The issue of Madam Bangura's title to the property in dispute was not a bone of contention in the pleadings filed: Pleadings were filed in 2006, and they remained unaltered.

Whether it was a proper thing to do, i.e. to execute a deed of conveyance whilst litigation relating to the land conveyed was pending in the High Court, is another matter, and to thereby, apparently set in concrete what ought to be determined by the Court, is another matter. In this connection, Mr Shears-Moses also argued that the Appellant's Vesting Assent executed by the Learned Trial Judge in his then capacity as Administrator and Registrar-General on 30 May,2007, was first in time, vis-a-vis, the Voluntary Conveyance executed by the Respondent in favour of his daughter, in 2008, and therefore ought to have been given precedence in accordance with the provisions of the Registration of Instruments Act, Chapter 256 of the Laws of Sierra Leone,1960. The same consideration applies to that deed as well: it was executed after the Appellant had instituted action against the Respondent, and therefore, ought not to have affected the outcome of the trial as it had not been pleaded and the writ of summons had not been amended to include its existence.

STATUS OF FATMATA BANGURA

9. Mr Fofanah also argued with much force in favour of the Learned Trial Judge's decision to make an order in favour of the non-party, Madam Bangura, whom he was not, on the basis of the pleadings and documents filed, acting on behalf of. The fact that Madam Bangura did give evidence in favour of her father, the Respondent, and that her document of title formed part of the Court Bundle, did not necessarily warrant a finding in her favour. The case was about whether her father was tenant to the Appellant. Respondent's defence was that he was no such tenant. His statement of defence at page 7 of the Record, is a mere denial of the Appellant's claim: that he was not a tenant of the Appellant, and could not therefore owe any arrears of rent ; and further that in view of the quantum of rent claimed as arrears, the claim ought to have been brought in the Magistrate's Court whose jurisdiction had been increased to Le5million in claims for recovery of property from tenants, by the Summary Ejectment Act, Chapter 49 of the Laws of Sierra Leone,1960 as amended by Act No.1 of 2006. That sort of defence is a far cry from averring that the property in dispute belongs to the Defendant. That Madam Bangura's document of title was the subject matter of her cross-examination by Counsel for the Appellant does not elevate it to a higher status.

10. Mr Fofanah referred to the "*Issues in Dispute*" - page 85 of the Record and argued that in paragraph 4 therein, the Respondent referred to the deed made in 2008. That "*statement of issues in dispute*" was filed on 16 February,2009, nearly three years after the writ of summons was issued. No issue was raised in the writ of summons nor, in the statement of defence filed about that deed. Obviously, this could not have been done. This Court does not believe that pleadings can be added to, or amended by statements of facts in issue. It is rather, the other way round: facts in issue can only arise out of pleadings filed. I find support for this in the words of LORD HOFFMAN in BARCLAYS BANK PLC v BOULTER & ANOTHER [1999] 4 All ER 513, HL at page 517 paras e - f: "*The purpose of the pleadings is to define the issues and give the other party fair notice of the case which he has to meet. Concealed and referential allegations do not perform this function*" Twenty years earlier, LORD EDMUND DAVIES had expressed the same view in FARRELL v SECRETARY OF STATE FOR DEFENCE [1980] 1 All ER 166, HL at page 173 paras e & f: "*It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions.....To shrug off a criticism as a 'mere pleading point' is therefore bad law and practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it....*"
11. At the stage of an appeal, such an omission, that is, one of a vital averment, cannot be remedied by an amendment as was made clear by SIR SAMUEL BANKOLE JONES in DAVIES v BICKERSTETH [1964-66] ALR SL 407, CA at page 46 LL31 38: "*Mr Doe-Smith, during the course of his reply, applied for leave to further amend his defence by pleading the equitable defence of acquiescence and the Statute of Limitation. We refused this application because these defences ought to have been obvious from the very commencement of the case, both during its first hearing and also during the re-hearing. This is not say that these defences must necessarily have succeeded, but is far too late in the day to make such an application....*"

OWNERSHIP OF THE LAND IN DISPUTE

12. In support of his argument that the Respondent proved to the satisfaction of the Court below that he was the owner of the land in dispute, Mr Fofanah contended in his paragraph 12 that the Respondent had proved his long possession of that land by tendering in evidence, City Council Rate demand notes and receipts for payment of the city rate. They are at pages 220 – 227 of the Record. Significantly, they date from 1996, and not from the 1950s, the period during which the Respondent claimed his possession of the land had begun. At page 161 of the Record, the Respondent gives an unlikely explanation for the absence of the earlier rate demand notes and receipts for payment. He said that in 2006, the person he now knew as the Appellant, went to him, pretending to be an employee of the City Council, and requested these documents. He handed them over to the Appellant, and they had not been returned to him. I have said this explanation is unlikely as, if, the Respondent had thought them of such importance, surely, he would have obtained copies from Council for purposes of the litigation he was involved in. In any event, as I have said repeatedly, the issue of ownership of the land was not really before the Learned Trial Judge. The cases cited by Mr Fofanah in support of his several arguments, are not therefore relevant for the purpose of disposing of this appeal.
13. On the other hand, if the purport of Mr Fofanah's argument in this last respect, was that the Respondent had become owner of the land in dispute, and that the Appellant's claim was statute barred in terms of the Limitation Act,1961, in that the Respondent had established his possessory title to the land in dispute for at least 50 years last past, and was impliedly setting up a defence of adverse possession, the Respondent was thereby raising a defence on a point of law, which ought to have been specifically pleaded – see Order 21 Rule 8(1)(a) High Court Rules, 2007 – HCR,2007, which states: "*A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of any relevant period of limitation,.....(a) which he alleges makes any claim or defence of the opposite party not maintaninable;....*" An averment that the Limitation period has expired, or a defence based on adverse possession, are both points of law which ought to be specifically pleaded. The position in English Law, pre-the 2000 Supreme Court Rules, was very much the same:

see Order 18 Rule 8 Supreme Court Practice, 1999 - White Book, 1999. In the notes to that Rule at para 18/8/24, the Learned Editors of that work state: *"Limitation - This point of law must always be raised by an express plea, even in actions for possession of land...."* Also, Order 21 Rule 8(2) HCR, 2007 states: " *Without prejudice to sub-rule (1), a defendant to an action for possession of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant, is not sufficient.*"

14. My view is, based on the authorities cited, that once the issue of the ownership of the land in dispute had arisen during the course of the proceedings, it was first, open to the Appellant to have applied to the Court below for leave to add Madam Bangura as a party, and to consequentially, apply to amend his statement of claim; or, it was open to the Respondent to have applied for such leave to add Madam Bangura as a second defendant; or, to amend the statement of defence filed some years earlier, and to add a counterclaim. None of this was done by either side, and the Learned Trial Judge did not suo moto, make either or all of such Orders. It follows that he ought not to have found for Madam Fatmata Bangura. The cases cited by Mr Fofanah in paragraph 2(iv) of his written submission, do not therefore have any bearing on, and are irrelevant to this specific issue. It is true, as was said in SMITH v WALKER [1968-69] ALR SL 115, PC at pages 123 -124 that a person in possession of property is under no obligation to apply to be added as a party, and could remain in possession until the person claiming to be owner seeks to evict him from the same. I have not said, nor do I think Madam Bangura was under an obligation to be added as a party: the responsibility for doing so rested with the either party to the litigation. I also do not believe that on the facts of the case, the ownership of the land in dispute has been fully contested, nor finally decided. On the pleadings, as I have said, it was not a fact in issue in the Court below.

LACK OF PROOF OF LANDLORD AND TENANT RELATIONSHIP

15. Turning to the case argued by the Appellant in the Court below, the best that can be said is that it was incompetently handled. The claim brought against the Respondent was one for recovery of possession of property only. The evidence relied on were receipts issued by Dr Marcus-Jones, purportedly to the Respondent. In his statement of defence, the Respondent clearly denied ever paying rent to Dr Marcus-Jones. It was

therefore clear at the outset that the Appellant was put to strict proof of this fact. Dr Marcus-Jones was not called as a witness. No explanation has been given for this. Only one receipt issued by Dr Marcus-Jones, dated 20th December,2005, (six months before the writ of summons was issued), exhibit "Q" at page 239 of the Record, was tendered in evidence. No explanation was given about the existence or non-existence of other receipts. This was a case in which the tenant/payer had denied making the payment. Whilst the receipt constituted admissible evidence that Marcus-Jones & Co had indeed received the sum of Le90,000 on 20th December,2005, it was not conclusive evidence that that sum of money had been paid by the person whose name appeared on the receipt. For how long had the Respondent being paying rent? All these were questions which remained unanswered at the trial. Further, the signature on the receipt appears to be that of one "King", but certainly not Dr Marcus-Jones, a well-known practitioner in our Courts. PW1, Appellant's Attorney admitted at page 159 of the Record, whilst being cross-examined by Mr Fofanah that he had never been present on an occasion when the Respondent paid rent to Dr Marcus-Jones. So, the state of affairs presented to the Learned Trial Judge at the end of the day was that just one receipt was issued to one Samuel Bangura by Marcus-Jones & Co on 20th December,2005. Not surprisingly, the Learned Trial Judge came to the conclusion that the Appellant had not proved on a balance of probabilities, that there was a landlord and tenant relationship between himself and the Respondent. I think he was right in this respect. But I think also, that he was wrong in law to go on to consider and determine the issue of title to the property as he clearly did at page 184 of the Record. The issue of ownership still remains to be decided by a Court of competent jurisdiction. Any action taken in this respect, we believe, will not be adversely affected by the Limitation period, as the appeal was filed in 2009, argued in 2011, but judgement is only now being delivered.

THE LEARNED TRIAL JUDGE'S POSITION

16. One last point I must deal with, is the issue of whether it was proper for the Learned Trial Judge to have presided over the trial, being that he executed the Vesting Assent in favour of the Appellant. The Vesting Assent was prepared and registered in May,2007 11 months after the writ of summons was issued. What Mr Shears-Moses is saying in effect, is that the Learned Trial Judge had, by declaring in favour of Madam

Bangura, set aside the very deed relating to the same property in respect of which he had himself executed a deed of conveyance in favour of the Appellant. Whether this is an outcome which is desirable in the eyes of the Law is a moot point. We note in particular, what the Learned Trial Judge himself had to say about the vesting assent he had himself prepared at in the course of his judgment at page 184 of the Record: "*Exhibit 'B' the vesting deed dated 30th May,2007 was finally registered in June,2007, almost 43 years after the death of the testatrix. It contained a site survey plan dated 4th June,1980, which means a survey plan 28 years old is inserted into a deed dated 30th May,2007. To my mind, this is a feeble attempt to produce a reliable document in respect of No. 5 Barracks Road. These two documents, to my mind, cannot assist the plaintiff to establish documentary title to the land, now subject-matter of this action...*" This in my view represents self-flagellation at best. To doubt the authenticity and efficacy of a document you had yourself prepared, will certainly put any Judge in an invidious position. This is, in my view, a situation which no Trial Judge should find or put himself.

17. However, we have stressed above that in view of the fact that none of the pleadings were amended, both deeds ought not have had any impact on the trial and on the Court's judgment. Whether or not the Learned Trial Judge was entitled to preside over a matter which concerned a deed which he had executed whilst occupying the office of Administrator and Registrar-General, is an issue which has been raised in another matter presently before the Supreme Court, and we would not like to express a view on this point at this stage. An issue like this may well be one dealt with by the Code of Conduct for Judicial Officers, which lists instances in which a Judge may recuse himself from hearing and deciding a particular matter.

FINDING

18. In the result, we are of the view that the appeal should be dismissed, while at the same the time the Declaration made in favour of Madam Bangura should be set aside for the reasons stated above.

ORDERS

THIS HONOURABLE COURT ADJUDGES AND ORDERS as follows:

The Appellant's appeal filed on 3rd November,2011 against the Judgment and Order of the Honourable Mr Justice A D Konoyima dated 8th October,2009, is dismissed in part:

i. Paragraph 1 of the Learned Trial Judge's Order dismissing the Appellant's action brought by way of writ of summons dated 12th June,2006 is affirmed.

ii. Paragraph 2 of the Learned Trial Judge's Order in which he declares title in favour of Fatmata B Bangura, is set aside as the issue of ownership was not properly before the Court; and, in any event, Fatamta B Bangura was not a party to the action.

iii. Paragraph 3 of the Learned Trial Judge's Order is set aside in view of sub-paragraph ii, supra. The property, for present purposes no longer belongs to the Respondent. It now belongs to Fatmata Bangura who was not a party to the action. The Respondent cannot therefore obtain or retain an Injunction in his favour, nor enjoy the benefit of the same. Similarly, the Injunction granted the Appellant by SOLOMON, JSC (then JA) on 11 February,2011 and upheld and continued in force by this Court on 18 March,2011, has no further relevance in view of the dismissal of the appeal. It is therefore discharged.

iv. Paragraph 4 awarding Costs in the Court below to the Respondent is upheld as the Appellant's case was dismissed, and its dismissal has been upheld by this Court.

v. Each party shall bear his own Costs in the appeal, as both sides have lost their respective arguments.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE,
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREMECOURT

THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT