Civ App 72/2008

IN THE COURT OF APPEAL OF SIERRA LEONE

BTEWEEN;

ALUSINE KARGBO - APPELLANTS
AMADU ODORO KANU
BASHIRU KANU alias ORDIRR

AND

MOMODU JALLOH - 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 MR JUSTICE S A ADEMOSU JUSTICE OF APPEAL, (now deceased)

COUNSEL:
M P FOFANAH ESQ for the Appellants
A E MANLY-SPAIN ESQ for the Respondent

JUDGMENT DELIVERED THE 31st DAY OF APRIL, 2019

BROWNE-MARKE, JSC

THE APPEAL

1. This is an appeal brought by the Appellant by way of Notice of Appeal dated 30th December, 2008, against the Judgment of the High Court presided over by SHOWERS, Ag JSC, then, SHOWERS, J, but now retired. The Notice of Appeal is at pages 114 and 115 of the Record. The main thrust of the appeal is that the Learned Trial Judge gave preference to the Respondent's Statutory Declaration made on 28th October, 2001 as against the Appellants deed of conveyance which was made on 31st March, 1980. There is also a complaint that the Learned Trial Judge relied heavily on the Respondent's

surveyor's expert report; and that she may have ignored Appellants' Counsel's address in her judgment, though the same was delivered at least six days before judgment was delivered. The Appellant also contends that the judgment is against the weight of evidence. The relief sought from this Court is that the said Judgment of the Court below be set aside, and that the action be re-heard or, re-tried.

COUNSEL'S CLOSING ADDRESS

2. We shall first deal with the ground relating to the Appellants' Counsel's closing address. The Complaint is that it appears, the Learned Trial Judge may have ignored it. In this respect, I shall refer to pages 56 - 59 of the Record. At the bottom of page 56, we find at the beginning of the record of proceedings for 14th November, 2007 that Mr Koroma, Counsel for the Respondent, was absent. At the top of page 57, it is recorded, that the parties were present, and that Mr Bangura, Counsel for the Appellants, closed the case for the Appellants. The Learned Trial Judge also minuted: "*Matter adjourned to 5th December, 2007 for written closing submissions to be lodged. Notice to A Koroma esq.*" There were three subsequent hearings on 5th & 18th December, 2007 and on 10th January, 2008 at which Mr Bangura was absent. In fact, at the 18th December hearing, the Learned Trial Judge had further deferred the submission of written closing addresses to 10th January, 2008. At the hearing on 10th January, 2008, Mr Amadu Koroma, Counsel for the Respondent was present. The parties were also present, but Appellants' Counsel was absent. Hearing was again adjourned to 22nd January, 2008 for the submission of written addresses. There were further hearings, as recorded on pages 59 & 59A, at which Mr Bangura was again absent. But on 12th March, 2008, he was present in Court, and he is recorded as saying at the top of page 59A: *"I am asking for the matter to be withdrawn for judgment. I shall endeavor to lodge my written closing address within two weeks from today's date."* He did not. At page 70 of the Record - page 8 of the Learned Trial Judge3's Judgment, the Learned Trial Judge notes, in her own handwriting that : "*I must add that Counsel for the Defendants forwarded his written clo3sing submissions on 20th September, 2008 when notices had been sent for judgment. It was clearly too late for consideration.*" Counsel cannot therefore use his own tardiness and/or

dereliction of duty as a proper argument in support of an appeal. There is no rule of law, or of practice which requires a Trial Judge to await the submission of addresses, whether written, or oral, before reserving judgment. Order 49 rule 9 of our High Court Rules, 2007, deals with Counsel's addresses. By sub-rule (8), " *The Court may order that any or all of the closing speeches referred to in this rule be reduced into writing and may fix the deadline for filing and serving of the same on the opposite party;.....*" The Learned Trial Judge did so in this case, and she cannot be faulted. It was Mr Bangura's duty to submit his written closing address before judgment, and not for the Learned Trial Judge to hold her hand until he felt like doing so. Besides, a Judge's judgment is based on the evidence led at the trial, and on the Law applicable to the facts of the case under consideration, and not necessarily on the addresses of Counsel. Counsel's addresses are meant to highlight those portions of the evidence favourable to, and in support of the case he or she is presenting, and to convince or persuade the trial judge that the law favours the interpretation he or she is pressing on the Court. Since this is an argument which has been raised quite frequently, we believe it is about time we gave some assistance to the Court below.

WHETHER THE DEFENDANTS WERE THE PROPER PARTIES AT THE TRIAL

3. We have gone through the other grounds of appeal, but we think, Counsel on both sides missed out on an issue which was all important in our view: whether in fact, and in law, the Appellants were the proper Defendants at the trial. The writ was issued against the Appellants, but the whole of the evidence points to Mr Mohamed Bayoh as being the owner of the land, which was the subject matter of the action brought by the Respondent. Mr Bayoh was not a Defendant in the action, not at the beginning, and not during the course of the trial, and not even at the end. There was really no '*lis*' between the Appellants on the one side, and the Respondent on the other. At no time was it pleaded, nor argued that the Appellants were laying claim to the Respondent's land. The Power of Attorney granted the 1st Appellant, and which is at pages 91 – 94 of the Record does not help the situation. The 2nd and 3rd Appellants were not given a like power, nor were they mentioned in that deed.

4. In his writ of summons at pages 1 -4 of the Record, the Respondent makes it clear that his claim is against persons who had laid claim to his land. The Appellants never did claim that the land in dispute was owned by them. In fact, in paragraph 4 of their joint defence filed on 20th May, 2005, all 3 Appellants aver that the land in question belonged to Mohamed Bayoh. In paragraphs 2 and 3 of the said defence, the Appellants averred that they were the caretakers of the land on behalf of Mohamed Bayoh. But, regrettably, Mohamed Bayoh was not sued The Appellants were sued in their respective personal capacities, and not in any representative capacity. Pleadings bind all parties to litigation. A judge in a trial can only give judgment for and against parties to the litigation. This ensures that if litigation is brought in the future between the same parties, and/or, in respect of the same subject matter, for instance, land, the respective pleas of res judicata, or, estoppel by judgment, can be raised.
5. A similar situation arose in a case I decided in 2010: Civ C 316/04 - JOHN T COLE v MARY BORBOR and another, judgment delivered 23rd April, 2010. There, the Defendants sued were not the owners of the land claimed by the Plaintiff therein. The land in dispute was said by the Defendants, to be owned by the 1st Defendant's husband, who was not a party to the action. The husband's deed of conveyance was tendered in evidence, and it was the cancellation of that deed that the plaintiff in that action sought. I had no alternative but to dismiss that plaintiff's action on the ground that there was no lis between himself and the persons sued. This is what I said in paragraphs 20 -22 of my judgment

*"As regards the 1st Defendant, it appears, on the evidence, that she is not the owner of the property. Her husband is the owner. The husband did give her a Power of Attorney on 2 June,2004 and it was duly registered, and later tendered as exhibit "F"..... The Power of Attorney empowered her, among other things, to take possession of his property situate off Bye Pass Road, Kissy Mess, and to institute and/or defend any legal action that may arise affecting the said property. Her husband was a disclosed Principal, and remained the fee simple owner of the property whose conveyance was witnessed in exhibit "G". As she has not laid claim to the property claimed by the Plaintiff, no Declaration of title could be made in favour of the Plaintiff,*

*against her. She freely admits in her evidence that she resides at 38B Thunderhill Road, Kissy, the property she says her husband bought in 1984, and denies that the Plaintiff owns the land. As she is partly in possession of the property by virtue of another person, her husband, who claims to be the owner thereof, and who is not a party to these proceedings, it would be quite impossible and improper for this Court to hold that she is a trespasser. In this respect she is relying on the principle of Jus Tertii, and I believe she is right in doing so. The proper party was, and is, clearly, her husband. The action against her therefore fails, and she is entitled to the Costs of this action. I cannot end without expressing my sadness that what otherwise appeared to be a good case, has failed because the real party to the dispute, was not sued. Plaintiff's Solicitor and Counsel will have to bear responsibility for this mishap."*

6. What we believe the Learned Trial Judge should have done after hearing the Respondent in evidence, was to have non-suited the Respondent on the basis that he may have a case against Mohamed Bayoh for a declaration of title, but not against the persons who were appearing as Defendants before her. She was perfectly entitled on the evidence, to come to the conclusion that the Appellants were trespassers to the Respondent's land, but it is clear, on a close perusal of her judgment, that she did not consider the Trespass claim. Reading through pages 8 and 9 of her Judgment - pages 70 and 71 of the Record, it is quite clear that her focus was on the declaration of title claimed by the Respondent, and not on the claim for trespass. As the case she herself relied on SEYMOUR-WILSON v MUSA ABESS at page 9 of her judgment shows, the claims for a declaration of title, and for damages for trespasses, merit different considerations. In a claim for trespass, it is the relative strengths of the opposing parties' titles which matter, and which carry the day. Nowhere in her Judgment did the Learned Trial Judge deal with the claim for trespass independently. That was a serious omission, and it deprives the Judgment of any validity, as against the Appellants.
7. We have come to the irresistible conclusion that the Judgment cannot be upheld. To uphold it will mean, in effect, passing judgment on the validity and strength of the title of someone who was not a party to the action. This we cannot do.

8. In the result, the Appellants' appeal is upheld. The Judgment of the High Court and the Orders made pursuant to the same, are hereby set aside. The Appellants shall have the Costs of this Appeal, and of the action in the High Court. Any Costs paid by the Appellants pursuant to the Judgment of the Court below shall be refunded to those who made payment.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JSC

THE HONOURABLE MR JUSTICE E E ROBERTS, JSC.