CIV. APP 8/2018

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

MOTHER AND CHILD REVERIE
MR. ABAQUA - APPELLANTS
TUNDE THOMAS
MICHAEL SHYLLON

AND

WALID YAZBECK - RESPONDENT

CORAM:

HON. MR. JUSTICE JOHN BOSCO ALLIEU - J.A.- PRESIDING
HON. JUSTICE MIATTA MARIA SAMBA - J.A.
HON. MR. JUSTICE KOMBA KAMANDA - J. A.

REPRESENTATIONS:

JENKINS-JOHNSTON & CO. FOR THE APPELLANTS
KMK SOLICITORS FOR THE RESPONDENT

JUDGMENT DELIVERED ON THE 9th DAY OF July 2020

HON. MR. JUSTICE JOHN BOSCO ALLIEU – J.A.

JUDGMENT

I

This is an Appeal against the Judgment of A. Showers, J. S.C., (but now retired) dated 1st February 2018 – Pages 348 to 370 of the Records.

The Appellants being dissatisfied with the said Judgement of A. Showers, J.S.C., (retired), lodged 9 (nine) Grounds of Appeal in this Honorable Court as contained in pages 556 to 558 of the Records.

II

In ground I of the Appeal, Counsel for the Appellants submitted that the Learned Trial Judge erroneously awarded more land to the Respondent in the total acreage of 22.0843 Acres which is over and above 12.0843 acres which was claimed by the Appellants.

Counsel for the Respondent replied that there was a mistake by the Learned Trial Judge in reference to 22.0843 acres of land other than 12.0843 acres. The said mistake, he submitted, was purely clerical and does not render the entire Judgment a nullity.

He further submitted that the Learned Trial Judge acknowledged, in her Judgment, that the Respondent's land comprised three (3) plots and those 3(three) plots amounts to 12.0843 Acres. Therefore, it does not affect the evidence and reasoning leading to the conclusion that the Appellants herein trespassed on the Respondent's property.

It must be noted that Counsel for the Respondent, in an Exparte Notice of Motion Application dated 5th February 2018 made in the Court below, had applied for an Order that the figure 22.0843 Acres appearing in the said Judgment of A. Showers J.S.C. is an error arising from an accidental slip and therefore be corrected by deleting the said figure of 22.0843 acres and replacing it with the figure of 12.0843 acres and wherever it appears in the said Judgment and Order. The Application was refused by the Judge who heard it. See pages 576-582 of the Records.

However, in the pending Appeal, it is observed that the Learned Trial Judge, in her Judgment dated 1st February 2018 referred to a Writ of Summons instituted against the 1st and 2nd Appellants only for the recovery of 22.0843 acres of land. See pages 1-5 of the Records. This was clearly erroneous on the part of the Trial Judge in that by her Order dated 17th April 2013 and effected on 14th May 2013, the 3rd and 4th Appellants were added as parties to the action and further an amendment was effected in the acreage of land claimed by the Respondents, that is, Plot 1 = 9.9453 Acres, Plot 2 = 1.4738 Acres, Plot 3 = 0.6652 Acres, all of which totals to 12.0843 Acres. See pages 56-59 of the Records.

Had the Learned Trial Judge averred her mind to the Amended Writ of Summons pending before her for determination, then she could not have referred and awarded the Respondent 22.0843 acres of land.

Having made an error in awarding 22.0843 acres of land to the Respondent, to which they were far less entitled; I will now refer to Order 23 rule 10 of the High Court Rules 2007 which states as follows:

> "Clerical mistakes in Judgments or Orders, or errors arising in the Judgments or Orders from any accidental slip or Omission, may at any time be corrected by the Court on motion or Summons without an Appeal."

The effect of the above mentioned rule is well explained in paragraph 20/11/1 page 392 of The Supreme Court Practice, 1999, Vol. I, Sweet & Maxwell, as applying only in cases where there is a clerical mistake in a Judgment or Order or an error arising from an accidental slip or omission. Apart from the rule, the Court HAS AN INHERENT POWER TO VARY ITS OWN ORDERS SO AS TO CARRY OUT ITS OWN MEANING and to make its meaning Plain (Thynne Vs. Thynne (1955) P. 272 CA; etc. etc.).

"Where an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the Order which the Judge obviously meant to pronounce" (per Lord Watson in Hatten V. Harris (1892) A. C. 560.

Furthermore, corrections have been made under the rule or the inherent power of the Court in the cases of Doswell V. Norton (1902) 18 T.L.R. 228, where an Order giving costs on a higher scale was corrected and Armitage Vs. Parsons (1908) 2 K.B. 410 where a Judgment for excessive amount of costs was corrected.

In the instant Appeal, the Respondent is claiming far less acreage of land, that is 12.0843 Acres as opposed to 22.0843 acres contained in the Judgment. I fail to see any inexpediency or inequitable effect if the correction is made in the Judgement of 1st February 2018 to reflect 12.0843 acres instead of 22.0843 Acres.

Based on all the foregoing, Ground 1 of the Amended Appeal dated 17th April 2018 fails.

III

In Ground 2 of the Appeal, Counsel for the Appellants submitted that the Learned Trial Judge failed to consider the written closing address as prepared by them and thereby breached the Cardinal Principles of Natural Justice, Audi Alteram Partem.

Counsel for the Respondent replied that the Learned Trial Judge was not bound by Law to consider the closing address of the parties before drawing up her Judgment nor did her omission to consider same (if at all) amount to breach of the Cardinal Principle of Natural Justice as claimed by the Appellants.

According to him, the Appellants were given an opportunity to be heard throughout the trial and they were represented by Solicitors who prepared and filed their case as contained in their Pleadings. The Appellants presented their witnesses at the trial whose testimonies were tested under cross examination and that the Learned Trial Judge extensively referred to the evidence and case for the Appellants in her Judgment. In effect, the Appellants were informed of the full nature and extent of the claims before the Honourable Court.

However, in the pending Appeal, it is observed that it was only the Appellant who submitted written closing address in the Court below. (See pages 426-431 of the Records). The Respondent did not present any written closing address in the Court below. It is therefore inconceivable that the Learned Trial Judge failed to consider the only written closing address before her, which is the written closing address of the Appellants herein.

In effect, I see nothing in this limb of the Appeal argued by Counsel for the Appellants.

In relation to the other Limb of this Appeal, that is, breach in the Cardinal Principle of Natural Justice of Audi Alteram Partern, I will first of all attempt to define the said term.

According to "WIKIPEDIA", "AUDI ALTERAM PARTEM" is a Latin phrase meaning "Listen to the other side" or "Let the other side be heard as well".

It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

The ingredients of the term is that before an Order is passed against any person, reasonable opportunity of being heard must be given to him. Generally, the motion includes 2 (two) elements – (i) Notice and (ii) Hearing.

The effect of violation of the rule is that the decision of the Court becomes void. A certain procedure must be followed in the rule. A person must be given full opportunity to defend himself.

In relation to this Appeal, it is observed that the Learned Trial Judge, in pages 4-6 of her Judgment dated 1st February 2018, the same found on pages 351-353 of the records, clearly stated the case for the Appellants. The 1st and 2nd Appellants entered Appearance to the Writ of Summons and by Notice of Motion dated 12th March 2013, the 3rd and 4th Appellants applied to be made parties to the action on the grounds that they are joint owners of the land in dispute and that they were the ones who put the 1st and 2nd Appellants on the said land.

By Order dated 17th April 2013, the 3rd and 4th Appellants were made parties to the action and given leave to file their Defence and Counter Claim against the Respondent and which they did – see pages 96-97 of the Court Records. Furthermore, in pages 10-13 of the Judgment of the Learned Trial Judge dated 1st February 2018, the same found on pages 358-361 of the Court records, she stated the testimonies of the Defence witnesses, that is, Tunde Thomas, 3rd Appellant as DWI and Mr. Alliah Joseph Sundima, a Licensed Surveyor as D. W. 2. These were the two (2) witnesses that the Appellants choose to call as witnesses in their case.

The Learned Trial Judge, in her Judgment, referred extensively to the evidence of DW2, Mr. Alliah Joseph Sundima and his report – "EX. M1-4" in pages 15-17 thereof, found in pages 363-365 of the Court records.

The Learned Trial Judge, in her Judgement, clearly stated and considered in page 20 thereof, which is page 368 of the records, the Counter Claim of the 3rd and 4th Appellants. According to her, the Appellants Counter Claim failed against the Respondent in the Court below and was

dismissed in that the 3rd and 4th Appellants did not correctly identify their land but they unlawfully and wrongfully entered the Respondent's land and laid claims to it.

Based on all the foregoing, it cannot be said that the Learned Trial Judge failed to adhere to the Principle of Natural Justice – Audi Alteram Partem. The Appellants were given the opportunity to defend their case and they were clearly heard in their Defence.

Therefore, Ground 2 of the Appeal also fails.

IV

In Ground 3 of the Appeal, Counsel for the Appellants stated that the Learned Trial Judge failed to consider that the 3rd and 4th Appellants, Mr. Tunde Thomas and Michael Shyllon are bona fide purchasers for value without notice of a rival claim to their Vendor's Title and have traced good root of title since 1986.

Counsel for the Appellants argued that the 3rd and 4th Appellants derived title in accordance with a conveyance dated 19th December 2001 expressed to be made between Matthew T. Sesay as Vendor therein and the 3rd and 4th Appellants as the Purchasers therein, the same registered as No. 1693 at page 12 in Volume 549 of the Book of Conveyances kept in the office of the Registrar General, Freetown. The predecessor in title of the 3rd and 4th Appellants derived title by a Conveyance dated 19th June 1989 expressed to be made between Gibrilla Deen Sesay and Abu Bakarr Kargbo as Vendors of the one part and Matthew T. Sesay as the Purchaser of the other part, the same registered as No. 749 at page 27 in Volume 427 of the Books of Conveyances kept in the office of the Registrar General, Freetown.

The said Gibrilla Deen Sesay and Abu Bakarr Kargbo derived title by virtue of a Statutory Declaration solemnly declared and subscribed to on the 1st day of September 1988, the same registered as No. 172 at page 56 in Volume 32 of the Books of Statutory Declarations.

Counsel for the Appellants, having traced the title of the 3rd and 4th Appellants herein submitted that they are bona fide purchasers for value without Notice. Furthermore, it was submitted, on behalf of the 3rd and 4th Appellants, that their predecessors in title have been in possession and occupation for over 20 (twenty) years before selling same to them and that any claim laid by

the Respondent to the said land would have been Statute barred by the provisions of the Limitations Act No.51 of 1961.

Counsel for the Respondent, on the other hand, submitted that the plea of bona fide purchaser for value without Notice was never raised at the trial nor did it form the basis of the Appellant's case at the trial and referred to pages 191 and 192 of the records. Therefore, the Appellants cannot now raise the principle of bona fide purchaser for value without Notice as a ground of Appeal when it was never an issue before the Learned Trial Judge.

The above notwithstanding, Counsel for the Respondent submitted that the Appellant had actual Notice of the Respondent's claim to the said land. The evidence before the Trial Judge, and which was uncontroverted, according to him, was that the Respondent had erected structures on the said land and had put a caretaker in occupation thereof in one of the structures but that notwithstanding the 3rd and 4th Appellants purchased and Leased the said land to the 1st and 2nd Appellants.

However, in relation to this ground of Appeal, it is observed that the 3rd and 4th Appellants derived title in 2001 – pages 390-393 of the records. The Respondent derived title in 1989 – pages 284 to 295 of the records.

In effect, the Respondent has a better title to that of the 3rd and 4th Appellants.

Again, the title of the 3rd and 4th Appellants predecessors in tittle is traced to a Statutory Declaration bearing date 1st September 1988 – see pages 400-404 of the Records.

The Respondent's predecessor in title, on the other hand, is traced to a conveyance bearing date 16th may 1980 – See page 286 of the records particularly paragraph 4 thereof.

In relation to the above, the Respondent's predecessor in title has a good root of title to that of the predecessors in title of the 3rd and 4th Appellants.

Based on all the foregoing, I fail to see how the 3rd and 4th Appellants are bona fide purchasers for value without Notice of a rival claim to their Vendors title.

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This ground of Appeal therefore simply fails.

It is therefore immaterial for this Honourable Court to determine whether or not the Appellants Solicitors had raised the issue of a bona fide purchaser for value without Notice in the Court below.

V

In Ground 4 of the Appeal, Counsel for the Appellants stated that the Learned Trial Judge failed to consider fully whether there had been an encroachment at all by the conduct of a locus in quo, but instead relied on the Surveyors reports produced by both parties whose reports were conflicting and as such misdirected herself.

Closely related to the fourth ground of Appeal is Ground 5 in which the Appellants Solicitor stated that the Learned Trial Judge erred in Law in failing to properly address what the Respondent's Surveyor meant in his report that both properties by their coordinates are separate and distinct and that was the basis of the Appellants defence throughout.

Counsel for the Appellants submitted that the Appellants had traced an exemplinary good root of title better than the Respondent, in that the Appellants not only relied on the strength of their title but also relied on the witness statement of their predecessors in title who had been in possession of their property without any known interest from any other party since 1988.

Counsel for the Respondent submitted that the crux of the Appellants defence was that the Respondent's property was separate and distinct from the Appellants property. The parties to this action relied on their respective Surveyors report filed in respect of the said matter.

Counsel for the Respondent also maintained that the respective land claimed by the parties herein are quite separate and distinct from each other. There is no encroachment between the two (2) properties but both parties are claiming the same property on the ground.

However, in relation to these grounds of Appeal, I am of the candid opinion that they were succinctly addressed by the Learned Trial Judge in pages 13 to 17 of her Judgment, found on pages 361-365 of the records, to which I entirely agree with her.

The second limb of the Appellants Counsel submission in Ground 5 of the Appeal hereof has already been dealt with in paragraph IV of this Appeal.

Based on all the foregoing, Grounds 4 and 5 of the Appeal dated 17th April 2018 also fail.

VI

In Ground 6 of the Appeal, Counsel for the Appellants stated that the Learned Trial Judge failed to consider the activities of the Appellants on the land since 2001.

Counsel for the Appellants submitted that the 3rd and 4th Appellants averred that the 1st and 2nd Appellants are their tenants in occupation of the land, have duly paid their Lease rents and have developed the property without notice of interest by or from the Respondent in this Appeal.

Counsel for the Respondent submitted that the Respondent had been in possession of the said piece or parcel of land and had built structures on the land consisting of bungalows and cement pillars along the boundaries of the property. The Respondent, according to him, was in possession of the land and the Appellants wrongly interfered with it.

However, in relation to this ground of Appeal, the record shows that the Respondent had erected structures on the said land and built pillars along its borders and had put a caretaker thereon. (see the Last paragraph at page 220 of the records and the first paragraph at page 362 of the records). That notwithstanding, the 1st and 2nd Appellants went ahead to erect structures thereon - page 355 of the records.

Furthermore, the Learned Trial Judge at pages 8 and 9 of her Judgment, found on page, 354-355 of the records stated that the 2nd Appellant, Mr. Abaqua, took steps together with the Councillor in the area, Ali Markay Sesay, to negotiate with the Respondent for the sale to him of the portion of land trespassed upon. The negotiations however failed as fighting erupted on the land and the 2nd Appellants did not show up again.

The conclusion here is that the activities of the Appellants on the land was clearly unlawful in that they still continued their activities although they knew that the land was clearly demarcated with pillars and there were structures on the land, one of which was occupied by a caretaker.

The Learned Trial Judge was therefore right not to have considered the activities of the Appellants on the land as such activities were unlawful with knowledge that the Respondent was in occupation thereof. It is therefore not correct that the Appellants had no notice of the Respondent's interest in the property herein; the property was well encumbered and to the knowledge of the Appellants who entered upon the Respondent's property unlawfully.

Based on all the foregoing, this ground of Appeal also fails.

Ground 7 of the Appeal have being dealt with in paragraph 4 of this Judgment.

VII

In Grounds 8 and 9 of the Appeal, Counsel for the Appellants submitted that the Learned Trial Judge failed to evaluate all the evidence before the Court and that the decision is unreasonable and against the weight of the evidence. He submitted that his Appeal be entertained in order to attain a just and equitable conclusion of this matter.

The Judgement, according to him, failed to ascertain whether the land which the Respondent is claiming is the same already owned and developed by the Appellants and no decision had been made with regards the Appellants Pleadings before the Court.

Counsel for the Appellants further submitted that the Appellants herein had established that they had been in occupation for well over the Statutory period of 12(twelve) years.

He prayed that the Appeal be upheld with costs against the Respondent.

Counsel for the Respondent submitted that the Learned Trial Judge exhaustively evaluated the evidence and averred her mind to all the issues raised at the trial.

He further submitted that the records at the trial shows that the Learned Trial Judge appreciated the evidence particularly on the issue of possession and that she made a clear and unequivocal finding on the identity of the suit land and the Respondent being in possession of same. There is no indication that the Judgment was plainly unsound or lacked reasoning.

However, in relation to these grounds of Appeal, we have looked at the records at what transpired in the Court below and we are satisfied that the Learned trial Judge evaluated all the evidence before her. Having thoroughly examined the pending Appeal in this Honourable Court, I am constrained to hold that the Learned Trial Judge failed to evaluate all the evidence before her and that her decision of 1st February 2018 is unreasonable and against the weight of the evidence.

Grounds 8 and 9 of the Appeal hereby simply fails.

In view of all the foregoing, IT IS HEREBY ORDERED as follows:-

1. That all the 9 Grounds of Appeal dated 17th April 2018 filed in this Honourable Court having failed, the said Appeal is accordingly dismissed.

2. That the 22.0843 Acres of land referred to by the Learned Trial Judge in her Judgement dated 1st February 2018 as being entitled to by the Respondent be corrected to reflect 12.0843 Acres of land which is the actual acreage to which the Respondent is entitled.

3. That costs of this Appeal assessed in the sum of Le20,000,000/00 (Twenty Million Leones) be paid by the Appellants to the Respondent.

HON. MR. JUSTICE JOHN BOSCO ALLIEU, JA. (PRESIDING).....

HON.JUSTICE M.M. SAMBA, JA. (I AGREE) .....

HON. MR. JUSTICE K. KAMANDA, JA. (I AGREE) .....