CIV. APPEAL 9/ 2015

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

DAUDA KOROMA _ 1ST APPELLANT

MRS SAFFIE KOROMA _ 2ND APPELLANT

(Acting by their Lawful Attorney EMMA KAMARA)

37 DAN STREET

FREETOWN.

AND

VICTORIA CHRISTIAN BISHOP - 1ST RESPONDENT

LACTON AYO BISHOP - 2ND RESPONDENT

8 BENKA LANE

FREETOWN

CORAM:

1. HON. MR. JUSTICE ALUSINE S. SESAY JSC - PRESIDING
2. HON. MR. JUSTICE SENGU M KOROMA JSC
3. HON. MR. JUSTICE JOHN-BOSCO ALLIEU JA.

EMMANUEL T. KOROMA ESQ. FOR THE APPELLANTS

LEON JENKINS-JOHNSTON ESQ. FOR THE RESPONDENTS

JUDGMENT DELIVERED ON THE 31st DAY OF JULY, 2020.

1. This is an Appeal from the decision of Honourable Mrs. A. Showers, JA (as she then was) dated the 5th day of June, 2015 on the following grounds:-

i. That the Learned Trial Judge was wrong in law in failing to appreciate the provisions as set out in Order 17 of the High Court Rules, 2007.

ii. That the Learned Trial Judge was wrong to have completely ignored the arguments of counsel for the Appellants that the property which was the subject-matter of this litigation is completely different from that claimed by the Respondents.

iii. That the Learned Trial Judge laid more emphasis/weight on the Judgment obtained on the 13th March, 2008 in which the Respondents herein were the Plaintiffs against the Appellant's Vendor, ABU KEITA) and therefore misdirected herself.

PARTICULARS OF MISDIRECTION:

a) ".....the plaintiffs having derived their title from ABU KEITA are his privies in estate and are bound by the Judgment of 13th March, 2008".

Failing to realise that the subject-matter is land and the contention of the Appellant is that the judgment against the said ABU KEITA was for a completely different portion of land which is quite distinct from that claimed by the Appellant.

b) "... in the light of all of the above, the Defendants have successfully established that the Plaintiff has no cause of action against them as the Plaintiff is bound by the judgment of the High Court dated 13th March, 2008 in which the court declared the Defendant to be entitled to possession of all that land situate at Peninsula Road, Adonkia and delineated and described as plots 2 and 3 on their survey plan LS:863/73 and LS: 259/96, the same pieces of land claimed by the Plaintiffs."

The aforementioned conclusion was erroneously drawn without proof of same as expert surveyor's report ought to have been prepared and if possible a locus visit for such conclusions to be apt in the circumstance.

iv. That the Judgment was unreasonable, unjust and could not be supported having regard to the affidavit evidence in the lower court.

RELIEF SOUGHT FROM THE COURT OF APPEAL:

i. That the judgment of the High Court dated the 5th day of June, 2015 BE SET ASIDE/DISMISSED
ii. That an Order be made for the matter to proceed to trial.
iii. That the Respondents pay the costs of this court and in the court below
iv. Any further order (s) that this court may deem fit and just.

PROCEDURAL BACKGROUND:

2. The Appellants herein (therein referred to as the Plaintiffs) instituted proceedings by way of writ of summons against the Respondents herein (therein referred to as the Defendants) praying for the following relief:
   a. A Declaration of title
   b. Possession of the said land
   c. Damages for Trespass to the said land
   d. An injunction restraining the Defendants, their servants from the said land or in any way trespassing on the said land
   e. Any other or further order that this court may seem just and proper.
   f. Costs.

3. Judgment was delivered on the 3rd June, 2015 in which the court dismissed the Plaintiff's case with costs.
4. It is against this judgment that the Appellants have now appealed to this court on the grounds already stated herein.

THE APPEAL.

Ground One:

5. "That the Learned Trial Judge was wrong in law in failing to appreciate the provision set out in order 17 of the High Court Rules, 2007. Mr. E.T. Koroma for the Appellant argued that based on the Order 17 Rule 1 paragraphs (a) and (b), the answers to all questions of law posed by the Defendants (Respondents herein) would not be determined at that stage if certain factual and documentary evidence are left out. In support of this submission, he referred to the following cases
   i. KORSO FINANCE ESTABLISHMENT ANSTALT –V- JOHN WEDGE (unrepresented) February 15th, 1999 CA. TRANSCRIPT NO.94/387;
   ii. PRENNE VS. SIMMONS (1971) 1 WLR 1381); and
   iii. SUB NOM. X (MINORS) –V- BEDFORD SHIRE COUNTY COUNCIL (1955) 3 ALLER 353

6. Mr. Koroma submitted further that assuming without conceding that this matter would be properly dealt with based on the determination of certain questions of law, mandatory requirements as provided for by Order 17 Rule 1 (3) paragraphs (a) and (b) have not been complied with. He argued that great care should be employed in the service of the motion under this order (order 17) and as such, unless the other party consents or there is a clear acknowledgment of service of the motion (by exhibiting the acknowledgement in the Affidavit of Service) and the affidavit of service of Notice of Hearing the Application must fail. He submitted that from the totality of what was submitted before the Learned Trial Judge, there was no consent or agreement between the parties for this action to proceed on a determination of certain questions of law.
7. Mr. Koroma submitted that the Appellants were never parties to the action against ABU KEITA, that there was no injunction in place restraining the said ABU KEITA from disposing of his land, that the Respondents should have added the Appellants in their action against ABU KEITA and that the statute of limitations does not apply to this present matter as immediately the plaintiff became aware that the Defendants were laying claims on the same piece of land, they instituted legal proceedings. In effect, the 12 year limitation period claimed by the Respondents was misguided.

RESPONDENTS:

8. Counsel for the Respondents, Mr. Leon Jenkins-Johnston in his synopsis on the first ground of Appeal submitted that the meaning of this ground of appeal was unclear. However, if the Appellants meant to assert that the matter ought not to have been decided on point of law, the correct recourse would have been for the Appellants to appeal against the judge's Ruling on the suitability for the matter to be decided on point of law, a Ruling which was delivered on the 21st February, 2014. The Appellants appeared to have waived this right when they made submissions pursuant to the said Order. (They should have Appealed against the Order of Showers, JA (as she then was) instead of Responding to the part of that Order regarding the determining the matter on a point of law).

9. Mr. Jenkins Johnston submitted that the Appellants were stopped, based on the principles of estoppels by Records which applies to the doctrine of "RES JUDICATA". Accordingly, the Appellant could not now question the Judges appreciation or otherwise of the Provisions of Order 17 of the High Court Rules, 2007.

10. Mr. Jenkins-Johnston went further to described two types of estoppels namely: Issues estoppel and cause of action estoppel.

11. In support of this submission, he cited the case of ARNOLD –V- WESTMINSTER BANK PLC (1991) 2 AC 93, where the court ruled that issue estoppels "may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties or their privies involving a different cause of action to which the same issue is relevant, one of the parties seek to reopen the issues".
12. Based on the above dictum, the Appellants having acquiesced to the Judge's construction of Order 17 by making submissions pursuant to the said Order made thereof cannot now say the Learned Judge failed to appreciate the provisions of Order 17 of the High Court Rules, 2007.

Ground 2:

8. Under this ground, the Appellants adopted the submissions on ground one and submitted further that the Appellants have been in occupation and possession of the said portion of land since 2007. Uninterrupted and it was only in 2010 when they were progressing with their construction that they learnt that the Respondents were laying claims over the same piece and parcel of land. He submitted that from both documents it was clear that these properties were not the same as the Respondents were claiming property lying situated and being at Peninsular Road, Adonkia Village and the Appellant were claiming property at Off Peninsular Road, Adonkia. The distinction was further exemplified in the surveyor's report presented by the Appellants in opposing the application for a determination on a question of law as all of these issues raised would not be adequately addressed without a full trial.

The Respondent

9. Mr. Jenkins-Johnston referred to paragraph 32 of the Judgment dated 3rd June, 2015 and submitted that the Learned Trial Judge did not ignore the argument of counsel for the Appellants that the property which was the subject-matter of this litigation was a completely different property.

10. Counsel cited the cases of OKOLI OJIAKO & ORS –V- OGUEZE (1962) 1 ALL NLR (PT.1) 8; CHIEF ADOMBA & ORS –V- ODIESE (1990) 1 NWLR P.T. 125) 165 and AYUWA –V- YOYIN (SUPRA) at 160, paras. B-H in support of the submission that "it is settled that a party in a land case, who has a previous judgment with respect to the same land in his favour, is entitled to plead and rely on it in such action.

11. Mr. Jenkins-Johnston submitted that this court must take judicial notice that the Appellant's predecessor-in-title ABU KEITA sold the land to the Appellants when the said land was the subject matter of dispute in court between the Respondents and the Appellant's predecessor-in-title ABU KEITA. It was therefore clear that the Appellant's vendor had no legal title to the said land when he purported to have transferred title to the Appellant as the land was before the court for adjudication when the transaction took place.

Ground 3:

13. The submissions of the Appellants hereunder were not much different from that under Ground two.
14. Mr. Koroma in addition submitted that the Appellants were merely innocent purchasers for value without notice.
15. He submitted further that the Learned Trial Judge would have ascertained that the pieces of land claimed by both parties were different from that claimed by the Respondents by a visit to the locus-in-quo but this was never done.

The Respondent:

16. Mr. Jenkins-Johnston submitted that the facts were clear enough that an expert's surveyor's report or a locus visit was unnecessary. The facts clearly show that the judgment was obtained against the Appellant's vendor in respect of the piece or parcel of land, a portion of which was sold to the Appellant. He concluded by submitting that the Learned Trial Judge was correct to have placed emphasis on the judgment dated 13th March, 2008 because the question of law in issue was whether the said judgment against the Appellant's vendor bound the Appellants, and this the Learned Trial Judge aptly answered in the affirmative.

Ground 4:

17. Mr. E.T. Koroma submitted in somewhat disparaging words that the Learned Trial Judge's Judgment was unreasonable and unjust as this matter ought to have proceeded to trial.

Respondent

Mr. Jenkins-Johnston submitted that for the Learned Trial Judge's decision to have been described as unjust and unreasonable, the judgment must have been error on point of law.

ISSUES FOR DETERMINATION

18. The main issues for determination in this appeal are simple and straight forward. They are as follows:-

i. Whether the learned Trial Judge was right in determining the matter on a point of law; and

ii. Whether the judgment of the High Court dated 13th March, 2008 (Halloway J, as he then was) was binding on the Appellants.

19. I shall start with the first issue and would so by stating the provisions of that order.

ORDER 17

20. Rule 1(1) "The court may on the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

    a. The question is suitable for determination without a full trial of the action; and

    b. The determination will finally determine subject only to any possible appeal, the entire cause or matter or any claim or issue in the cause or matter.

21. Rule 1(2) "Upon the determination, the Court may dismiss the entire cause or matter or make such order or judgment as it thinks just.

22. Rule 1(3): The court shall not determine any question under this Order unless the parties have either:-

    a. Had the opportunity to be heard; and

    b. Consented to an order or judgment on the determination.

23. This was the Rule the Appellant's counsel alleged was not complied with by the LTJ.

24. The English Supreme Court Practice (The White Book) at paragraph 14a/2/3 proffered the following as requirements of Order 17(Order 14a under the English Rules):

    a. The defendant must have given notice of intention to defend;

    b. The question of law or construction is suitable for determination without a full trial of the action;

    c. The determination shall be final as to the entire cause or matter or any claim or issue therein; and

    d. The parties had an opportunity of being heard on the question of law or consented to an Order or judgment being made on such determination

25. The Appellant's Counsel, E.T Koroma Esq. was clearly wrong to have submitted that the LTJ ought not to have determined the questions of law posed without the consent of the other party. This is a misunderstanding of Order 17 Rule 1(3) (a) and (b). That Rule expressly required that one of the two conditions must be fulfilled viz, opportunity to be heard **or** consent by the parties to an order. This Rule used the disjunctive and not the conjunctive.
26. Having read the Judgment of Showers JA (as she then was) and an analysis of Order 17, I am convinced that the procedure envisaged by the said Order was followed and therefore hold that the LTJ was correct to determine the questions posed on a point of law. I am strengthened in this conviction by the case of **KORSOR ESTABLISHMENT** (supra), which was unfortunately relied on by Counsel for the Appellant. In this case, the English Court of Appeal laid down the following principle, amongst others ' Respondents to an application under Order 14A are not entitled to contend that they should be allowed to hunt around for evidence or something that might come up on discovery which could be relied upon to explain or modify the meaning of the relevant material. If there were material circumstances of which the court should take account in construing the documents, they must be taken to have been known, and could only be such as was known, to the parties when the agreement was made. In the absence of such evidence, the court should not refrain from dealing with the application".
27. Mr. Koroma also cited the case of PRENN –V- SIMMONDS (supra) and referred to the dictum of Thomas Bingham M R. but only that portion useful to his case. This was unfair as His Lordship went further to say ".....But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleadings) the actual facts (are) the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before the decision is reached'. (E (A MINOR) –v- DORSET C.C. (1995) 2 A C, 633.

28. The other case of SUB NOM. X (MINORS) –V- BEDFORDSHIRE CC (1995) 2 AC. 633 cited by Mr. E.T. Koroma was clearly inapplicable. The decision therein was based on situations where the law was not settled but in a state of development".

29. The second issue related to the effect of the judgment of the court dated the 13th day of March, 2008. Mr. E. T Koroma for the Appellants argued that the Appellant was not a party to the action against ABU KEITA and therefore the said Judgment did not affect their own property and to regularise the said situation, the plaintiff issued out a Writ of Summons against the Respondent for a

declaration of title. He argued further that there was no injunction restraining the said Abu Keita from disposing of his land, but the fact remained that during the subsistence if the matter, the property changed hands.

30. Mr Jenkins-Johnston for the Respondents on the other hand argued that the Appellant were by that Judgment estopped, based by the principle of estoppel by records which applied to the doctrine of res judicata.

31. In her Judgment, the LTJ had this to say on this point:

> " It is clear from the facts of this case that the Plaintiffs are privies to Abu Keita having derived their title from him. The pieces or parcels of land which are the subject-matter of the Judgment of 13th March, 2008 granted in favour of the Defendants are the same as that which the Plaintiff are bringing the present action to recover possession- see conveyance dated 15th March, 2007 expressed to be made between Abu Keita as Vendor and the Plaintiffs as Purchasers".

32. I agree with the findings of the LTJ's findings on this point.
33. The rule of estoppel by res judicata was formerly said to be a rule of evidence but has recently been considered to be a rule of public policy- HUMPHRIES-V-HUMPHRIES (1910) 2 KB 531 at 536. It is said to be part of adjectival law. The rule is that where a final judicial decision has been pronounced on merits by a court of competent jurisdiction in Sierra Leone over the parties and the subject-matter, any party to such litigation, as against any other party (and in the case of a Judgment in rem; any person whatsoever, as against any other person) is estopped in any subsequent litigation from disputing such decision on the merits, whether it be used as foundation of an action. Or as a bar to any claim, affirmative defence or allegation provided the party entitled raises the point at the proper time. The estoppel applies to privies.
34. This takes me to a discussion of the constituents of res judicata estoppel. A party setting up res judicata by way of estoppel as a bar to his opponent's claim, must establish the following elements, namely'
    i) The decision was judicial in the relevant sense;
    ii) It was in fact pronounced;
    iii) The Tribunal had jurisdiction over the parties and the subject-matter;
    iv) The decision was:-
        a) Final; and
        b) On the merits;
    v) it determined the same question as that raised in the later litigation; and

vi) The parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

35. I hold that the decision of Halloway J. (as he then was) dated the 13th day of March, 2008 and the present action met all of the requirements herein. The Appellant is therefore estopped from denying the existence and validity of the said Judgment; particularly when there was no appeal therefrom. It follows that though the Appellants might not have had notice of the said Judgment, their Solicitor clearly had actual or constructive notice of it but failed to properly advise his clients.
36. It was gleaned from the records that no action was taken by the Respondents to stop the Appellants from constructing a dwelling house on the disputed land. It was in fact the Appellants who instituted the present action in the High Court. The final Orders herein shall take this into consideration
37. In the circumstance, the Appeal is dismissed with costs, such costs to be taxed if not agreed.
38. It is also ordered, on equitable grounds that the parties be at liberty to enter into negotiations for the purchase of that part of the Respondents' land unlawfully occupied by the Appellants within sixty days from the date of this Order.

HON. MR JUSTICE SENGU MOHAMED KOROMA
JUSTICE OF THE SUPREME COURT.

----------Hon. Mr Justice Alusine S Sesay
JUSTICE OF THE SUPREME COURT.
(PRESIDING).

----------Hon. Mr Justice John-Bosco Allieu
JUSTICE OF THE COURT OF APPEAL.