

KANU v. KAMARA

SUPREME COURT (Luke, Ag. J.): October 3rd, 1964
(Civil Case No. 70/63)

[1] Evidence—burden of proof—trespass—burden of proof on plaintiff:
In an action for trespass the plaintiff must prove the facts which he
alleges (page 138, lines 11–12).

[2] Tort—trespass—burden of proof—burden on plaintiff: See [1] above.

[3] Tort—trespass—trespass to land—possession sufficient to support ac-
tion—what constitutes possession: Any form of possession of land is
sufficient to support an action for trespass to that land, so long as it
is clear and exclusive and exercised with the intention to possess;
even in the absence of actual possession a documentary title commenc-
ing with some person rightfully in possession is generally sufficient
(page 138, lines 15–30).

The plaintiff brought an action against the defendant for trespass
to his land.

The plaintiff was the owner of a house and a plot of land which
shared a boundary with the land of the defendant. The defendant
began to erect a building part of which abutted on to the plaintiff's
land. The plaintiff erected a wall on the boundary of his land and
the defendant entered upon the plaintiff's land and broke the wall
down.

The plaintiff brought the present proceedings seeking an injunc-
tion and damages. He contended (a) that the house which the de-
fendant was building should not have encroached on his land but
should have been four feet away from the boundary and (b) that
the defendant was guilty of trespass in entering upon his land and
destroying his wall. The defendant denied that he was guilty
of trespass and counterclaimed that the land in question belonged
to him and that it was the plaintiff who was guilty of trespass.

Cases referred to:

(1) *Bristow v. Cormican* (1878), 3 App. Cas. 641; 26 W.R. Digest 90,
applied.

(2) *Wuta-Ofei v. Danquah*, [1961] 1 W.L.R. 1238; [1961] 3 All E.R. 596.

Candappa for the plaintiff;
During for the defendant.

LUKE, Ag. J.:

The plaintiff has brought an action against the defendant in which he is claiming several remedies.

Pleadings were delivered in which the plaintiff, *inter alia*, alleged:

"3. The plaintiff was and is the owner and occupier of the said land and house.

4.(a) The defendant who claims to be the owner of the land to the west of the plaintiff's land recently commenced to erect a building on the said land. The defendant has so erected the building that part of the building abuts on the western boundary of the plaintiff's land and is not at least four feet away from the said boundary as is required by law.

(b) By reason of such building, the defendant has wrongfully encroached upon the plaintiff's land to the plaintiff's loss and damage.

5. On January 19th, 1963 when the plaintiff by himself, his agents and workmen began erecting a boundary wall along the western boundary of the said land as he lawfully might, the defendant by himself and a number of servants and workmen wrongfully entered the plaintiff's land, broke down and removed a post which the plaintiff had caused to be placed on the boundary, and removed the boundary beacon and generally obliterated the said western boundary of the plaintiff's land.

6. The defendant still persists in the said claim and intends to repeat the acts hereinbefore complained of."

The defendant by his defence does not admit paras. 1, 2 and 3 of the statement of claim. He also—

"(2) denies paras. 4(a) and 4(b) of the statement of claim herein and says the building he is erecting is on land owned by him (the defendant) in fee simple absolute and that he is in possession of the said land;

(3) says as regards para. 5 of the statement of claim that the plaintiff on or about January 19th, 1963 wrongfully began erecting a boundary wall on his (the defendant's) land and caused damage by himself, his agents or servants to his (the defendant's) building which he has been erecting;

(4) denies para. 6 of the statement of claim herein."

The defendant further stated in his defence that save and above those facts expressly admitted he denies every allegation of fact

contained in the statement of claim herein. He further counter-claims for general and special damages, and for an injunction restraining the plaintiff from continuing or repeating the acts complained of.

5 There was a reply delivered by the plaintiff in which he joined issue with the defendant. Regarding the counterclaim he asserts that he is lawfully entitled to commence to erect a wall and denies that any damage was done to the defendant's building.

10 By the pleadings which have been drawn and delivered, the issue which the court has to decide is: "Who is in possession of the disputed land?" In an action such as this the plaintiff who has averred certain facts has by law to prove them. This is an action of trespass, and to support such an action possession is sufficient. 38 *Halsbury's Laws of England* 3rd ed. at 743, in para. 1213 states
15 what possession is sufficient: "Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrongdoer." The case cited is that of *Bristow v. Cormican* (1). Lord Hatherley held (3 App. Cas. at 657) in a passage cited in *Wuta-Ofei v. Danquah*
20 (2) ([1961] 1 W.L.R. at 1243; [1961] 3 All E.R. at 600) that the slightest amount of possession was sufficient to entitle the person in possession, or the person who claims under those who have been or are in possession, to recover against a mere trespasser. In *Bristow v. Cormican* (3 App. Cas. at 651, 652), Lord Cairns, L.C. maintained
25 the proposition which was not dissented from, that even in the absence of actual possession a documentary title commencing with some person rightfully in possession and connecting itself with the plaintiff in an action of trespass would, generally speaking, and in the absence of any title in the defendant by adverse possession be
30 sufficient to maintain an action of trespass.

35 What is the evidence which the plaintiff has led in support of this claim? He started off by calling the surveyor whom he got to survey his land, and who deposed that the plaintiff instructed him to re-establish the boundaries of his land from plans he gave him, and that the plan he was referring to was Exhibit B put in by the plaintiff in his evidence. The disputed area was on the Brass Street side. Reading Exhibit B it will be seen that the boundary on that
40 side showed in favour of the plaintiff 54 ft. whereas the defendant in Exhibit F showed 64 ft. Following that up by looking at the measurements on the opposite side, Exhibit B will be seen showing 65 ft. whereas Exhibit F showed 42 ft. Unfortunately the respective

positions of Brass Street in the two plans are shown as on the north in the plaintiff's plan and on the east of the defendant's plan.

The surveyor said that the public boundary beacon which he used to start his measurements is what is shown on the plan. He has also shown SLPB 3 and SLPB 2 on the plan. These beacons are those which marked the lorry park. The length of the property on the north of the plaintiff's land along Brass Street is 54 ft., on the south is 67 ft., on the east is 76 ft. 3 ins., and on the west is 77 ft., and he further said that the plan, Exhibit A, is exactly a plan of the plaintiff's land. Under cross-examination this witness said:

"I did not have the opportunity of perusing the defendant's title deeds or the plan, and I am not in a position to quote the measurements of the defendant's land. My plan does not show the extent of the defendant's land. I did not get all my data from the plaintiff. The data I took from my measurements. My measurements were from government beacons. The government did not give me any data as to the extent of the defendant's land."

Apart from the evidence as to the measurements given by the plaintiff's surveyor the further evidence given by the plaintiff was that having bought the land (which according to Exhibit B was on April 28th, 1959 from the executors of the will of Edmund Asgill, who died on March 25th, 1942, and probate of whose will was granted to them) he built a three storey house in Brass Street. There is nothing shown as to when Edmund Asgill (deceased) was seised in fee simple in possession of the said land. The plaintiff also stated that the land on the west belonged to the defendant and that when he was building his house there was no building on the defendant's land. He also gave evidence that while the defendant was building he (the plaintiff) wanted to put up a wall between the defendant's land and his, but the defendant prevented him, as a result of which this action was commenced.

Under cross-examination the plaintiff was asked if he knew the vendor of the defendant's land and he said it was Alhaji Fofana. He was also asked whether Alhaji Fofana had mortgaged this land to him before he sold it to the defendant but he denied this, explaining that Fofana had wanted to sell the land to him. He said that he had gone with Fofana to the lawer's office but the deal fell through because the measurements were not what he had expected. At the next sitting of the court whilst he was still under cross-examination, a portion of a document was shown to him where he signed his

name as "Borrower" releasing this said property, now belonging to the defendant, to the vendor, Alhaji Fofana. That document was put in as Exhibit C. I make no comment on this course of conduct.

5 The defendant gave evidence in which he deposed that he and the plaintiff have adjoining properties at Brass Street and that after paying for the property the vendor executed a conveyance to him, which he put in as Exhibit D. He also said that when he purchased the property the vendor gave him his previous title deeds to the property, which he put in as Exhibit E. Reading through Exhibit
10 E it will be seen that the title of the defendant's predecessor dates back as far as December 30th, 1899. The descriptions of the boundaries of this land are the same as those tendered by the defendant's surveyor in his plan, which was marked "F."

15 When he was cross-examined by the plaintiff's lawyer he said that it was in 1960 that he first asked Alhaji Fofana to sell the land to him, and that he got the land surveyed for him before he paid for it. He also said he did not know that the government had acquired land near the land he bought for a lorry park. He said however that the government left four feet between their own land and his, which he knew from the manner in which the government
20 placed its pegs. There is a high fence which the government built around the lorry park and this is on one side of his land. He stated that when his surveyor checked and found the measurement on the parking ground side correct he did not change and that he has no beacons on the parking ground side. He further said there has been
25 no query about his building from the Ministry of Housing. There is no beacon between his land and the plaintiff's as he had seen the plaintiff remove them.

30 The defendant's surveyor said that before he surveyed the defendant's land he called for his conveyance deed from which he got his measurements, and when he checked the measurements with his survey he found that there had been an encroachment, which he marked in grey in Exhibit F. He also said that after he surveyed the land he placed beacons on it, and as there were no beacons on
35 the encroachment he put one on it. Subsequently he went to the land after placing the beacons and found they had been removed. Under cross-examination he said that the defendant's land is on the eastern side on the plaintiff's land and that according to Exhibit F, Mr. Kanu's land is now government acquisition land
40 which is on the western side and that the boundary is well demarcated. He said that the encroachment is not on Kanu's side but

that of Mr. Garber, which seems to be that of Mr. Kabbia (deceased). He also told the court that he did not make a plan himself but a copy of the plan he found on the document, as that plan had been passed and signed by the Director of Surveys and Lands.

From the evidence which has been deposed I am satisfied that the encroachment was on the eastern side of the defendant's property. Taking Brass Street as the focal point the length of the plaintiff's land along it is 54 ft., whereas the defendant's is 64 ft. As the plaintiff's surveyor said, he did not see the defendant's plan and so did not know the measurements of it on the Brass Street side. Had he known the extent of the defendant's measurement on Brass Street the diagram which he has drawn on Exhibit A might have been different.

There is evidence that the plaintiff was the first to acquire land and build on it, but it cannot be said that he had lived there long enough to acquire the land by virtue of the Statute of Limitation, nor is there evidence that his predecessor in title had. Looking at the documents which have been tendered, Exhibit B showed that the plaintiff could trace his predecessor in title to the year 1942 whereas the defendant could trace his to 1899. It is also significant that whereas Exhibit B described the measurement of the Brass Street side as 54 ft., Exhibit D showed it as 64 ft. which is 10 ft. more than that in Exhibit B. If, as the evidence has shown, the encroachment is on the eastern side of the defendant's land then it is quite clear that the plaintiff and not the defendant is the one who has encroached on the other's property.

Having found that the plaintiff was the person who has encroached, his action therefore fails.

The defendant counterclaimed that the plaintiff on or about January 19th, 1963 entered into his land and wrongfully erected a wall and also did damage to the building he has been erecting on his land. He gave evidence that three years ago the plaintiff went on his land and made a fence and in doing so caused damage to his wall in consequence of which he had workmen to assist him in carrying out the repairs, which cost him £60. He called no witness nor tendered any receipts in support of his claim, and as such the court will disallow this claim of special damages. There will be no order for an injunction. Evidence had been given that the plaintiff and not the defendant was the trespasser and I allow the defendant general damages of £25 for the said trespass.

The plaintiff's claim is dismissed with costs. Regarding the

counterclaim the defendant is awarded general damages of £25 with costs to be taxed.

Order accordingly.

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TURAY v. REGINAM

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COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): October 24th, 1964
(Cr. App. No. 16/64)

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[1] **Criminal Law—degrees of complicity—aiding and abetting—presence at scene of crime not enough—must be present with common purpose consenting and encouraging:** Mere presence at the scene of a crime cannot make a person guilty and there must be evidence that he was present consenting and with a common purpose with the principal in the first degree and by his presence encouraged him (page 146, lines 5–13; page 148, lines 26–32).

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[2] **Criminal Law—murder—multiple offenders—accused present with principal in first degree—must be present with common purpose consenting and encouraging:** See [1] above.

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[3] **Criminal Procedure—defence—calling witnesses—prosecution witness heard after defence closed—defence may apply to call rebutting evidence:** When a prosecution witness is heard after the close of the defence case, the defence may apply to call evidence in rebuttal or explanation (page 148, lines 6–9).

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[4] **Criminal Procedure—defence—close of defence case—prosecution witness heard after defence closed—defence may apply to call rebutting evidence:** See [3] above.

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[5] **Criminal Procedure—prosecution case—calling witnesses—witness's attendance delayed—conditions on which witness may be called after close of prosecution case:** Where owing to some natural cause outside anyone's control a prosecution witness fails to attend until the prosecution case has been closed and the prosecutor has commenced his closing address, the court may allow the witness to be called if the prosecutor has taken all necessary steps to call him and the defence is not taken by surprise (page 147, line 30—page 148, line 24).

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[6] **Criminal Procedure—prosecution case—close of case for prosecution—witness's attendance delayed—conditions on which witness may be called after close of prosecution case:** See [5] above.