BANGURA v BANGURA

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COURT OF APPEAL OF SIERRA LEONE, Civil Appeal 35 of 1977, Hon Mr Justice KEO During PJ, Hon Mr Justice SCE Warne JA, Hon Mr Justice CS Davies JA, 26 January 1977

[1] Land – Title – Sale of land – Parol contract – No transfer of land in writing – Whether part performance sufficient – Whether deed of transfer executed by deceased vendor's next of kin enforceable – Circumstance in which parol contract for sale of land enforceable

[2] Land – Title – Requirement to show history of ownership of land for 40 years – Vendor and Purchaser Act 1874 s 1

[3] Land – Trespass – Distinction between trespass based on title and trespass based on possession – Standard of proof in action for trespass based on title higher than for action based on possession

The respondent agreed to purchase a piece of land at Main Road, Wellington Village in the Western Area of Sierra Leone from Kebbie Bangura ("the vendor"). He paid Le210 for the land by three installments for which he obtained receipts which he later tore up. The vendor died before he had conveyed the land to the respondent. Subsequently, by a Deed of Agreement, the children of the late vendor purported to transfer the land to the respondent.

The plaintiff made a claim for trespass against the defendant, who constructed a pig's pen on the land and refused to pull it down. The High Court granted this claim and the defendant appealed. The main issues were whether the respondent had ever obtained title to the land and whether the vendor had a title to the land which could have devolved on his personal representatives.

Held, per Warne JA, allowing the appeal:

1. There was no Memorandum in Writing signed by the vendor for the transfer of the land. Although there was evidence that the respondent had part performed the agreement by payment of the sum of Le210 to the vendor, this payment alone and entry into possession did not give the respondent title to the land. The Deed of Agreement executed between the children and the next of kin of the vendor and respondent had no force in law and was unenforceable. It was neither a Memorandum in Writing as required by Section 4 of Statute of Frauds nor was it a Deed of Conveyance as provided for by the Conveyancing and Law of Property Act 1881.
2. There are specific circumstances where a parol contract of sale regarding land is enforceable. These are where:
   (i) the party against whom it is sought to enforce the contract fails to set up the want of writing as a defence to the action;
   (ii) if he has fraudulently prevented the creation of writing evidence;
   (iii) if there has been a parol agreement that the estate which is to be conveyed absolutely to the purchaser shall be held by him on trust by the vendor;
   (iv) if the plaintiff can prove a sufficient act of part performance. None of these circumstances applied in this case.

3. The vendor should have shown the history of the ownership of the land for a period of at least 40 years to satisfy the provision of s 1 of the Vendor and Purchaser Act 1874. This was not done in the instant case and as such the contract of sale of the land between the vendor and the respondent was of no effect. There was no evidence that the vendor had been in possession of the land for at least 40 years. The very foundation on which the claim for trespass was made did not exist. *Re Cox and Nevo's Contract* [1891] 2 Ch 109 applied.

4. There is a clear distinction between a claim for trespass based on title to land and that based on possession of the land. If the claim based on title fails, the court should proceed to examine the evidence regarding possession, if any. The standard of proof in a claim based on title to land is higher than that required in a claim based on possession. The evidence before the lower court showed that the respondent was not in possession of the land at the time of the institution of the action. There was no evidence that at the time of alleged trespass the respondent was in exclusive possession of the land. Therefore he could not ground a claim for trespass based on possession. *Dunstan E John & Reuben Macaulay v William Stafford, Alfred George Nathaniel Cole & John Eddie Taylor* (Supreme Court, Civil Appeal 1/75, Betts JSC, unreported) followed.

Cases referred to
Cox and Nevo's Contract, Re [1891] 2 Ch 109
Dunstan E John & Reuben Macaulay v William Stafford, Alfred George Nathaniel Cole & John Eddie Taylor (Supreme Court, Civil Appeal 1/75, Betts JSC, unreported)
Henrietta Morgan and Another v Margaret Leigh (Civil Appeal 2/75, unreported)

Legislation referred to
Conveyancing and Law of Property Act 1881
Statute of Frauds 1677 s 4
Vendor and Purchaser Act 1874 s 1

Other sources referred to
Cheshire Modern Real Property 7th Ed pp 632, 633

Appeal
This was an appeal by the defendant against the judgment of Lawrence-Hume J (Acting) on the 18th September 1973 granting a claim for trespass made in the High Court by the plaintiff, Abdulai Bangura. The facts appear sufficiently in the following judgment.

Mr C Doe-Smith for the appellant.
Mr JV Davies for the respondent.

WARNE JA: On the 18th September 1973, a judgment of Lawrence-Hume J (Acting) was delivered by Idogu J, granting a claim for trespass made in the High Court by the plaintiff/respondent. It is against this judgment that the defendant/appellant has appealed to this court. The substance of that judgment is that the plaintiff/respondent has discharged the burden of proving his title to the land in dispute and that the defendant/appellant has trespassed on the said land. The learned trial judge, inter alia, made this finding:

> "Has the plaintiff discharged the burden of proving his title to the land? I find that he has. There is evidence that he bargained for the purchase of the land with Kebbie Bangura (deceased). That he paid the sum of Le210 as purchase money. That after the death of Kebbie Bangura his niece and other next of kin completed the verbal contract of sale by

executing a transfer of land. And finally, that the land was registered by the Registration Officer as the property of the plaintiff Abdulai Bangura".

The learned trial judge made this finding and ordered thus:

"I find therefore, that the defendant has trespassed on the land and I hereby give judgment for the plaintiff. I order that the defendant do pay to the plaintiff the sum of Le160 as damages for his trespass to the land. I also order the defendant by himself, his servants or agents, otherwise, to desist from further trespass on the land. And I finally order the plaintiff's costs to be taxed and paid by the defendant herein. The defendant bears his own costs."

It is against this judgment that the following grounds of appeal have been lodged:

1. That the learned trial judge was wrong in law in holding that the plaintiff was not obliged to investigate and show the title of the alleged vendor.
2. The learned trial judge was wrong in law in holding that although the alleged vendor of the land in dispute died before executing a conveyance no administration of his estate if any was necessary.
3. That the learned trial judge was wrong in law in holding that the purported Deed of Transfer by the children of the deceased although they did not give evidence at the trial was sufficient to pass the fee simple of the land to the plaintiff.
4. That the learned trial judge was wrong in law in holding that registration of a purported transfer deed by the children of the alleged vendor was tantamount to specific performance of an alleged contract of sale of the land in dispute.
5. That the learned trial judge was wrong in law holding that failure of the witness to the signatures of illiterates to give evidence was not fatal.
6. The judgment is against the weight of evidence.

The facts of the case may briefly be stated. The plaintiff negotiated with one Kebbie Bangura for the purchase of a piece of land situated at Main Road, Wellington Village in the Western Area of Sierra Leone. The plaintiff paid for the land by three installments for which he obtained receipt and he later tore them up. The amount he paid was Le210. He was shown the land by Kebbie Bangura in the presence of a surveyor who put beacons on the land. Two months before the death of Kebbie Bangura, the purported vendor, the plaintiff went to him and reminded him that he Kebbie Bangura had not conveyed the land to him. After the land had been shown to the plaintiff, he planted on it and put his sister-in-law in possession to continue the plantation.

Kebbie Bangura died before he had conveyed the land to the plaintiff. Sometime in 1967, by a Deed of Agreement, the children of the late Kebbie Bangura purported to transfer the land to the plaintiff. The plaintiff said he later saw the defendant constructing a pig's pen on the land. He asked him to pull it down but defendant refused and the pen is still on the land. The defendant has said that he is in possession of the land and it devolved on him on the death of his grandmother.

Counsel for the defendant/appellant argued Ground 6 and then accepted the point under Ground 6 in prosecuting Ground 1 to 5. Counsel referred to the Statement of Claim and the Statement of Defence and the entire judgment of the lower court. Counsel complained that the title of the plaintiff was acquired by the Deed of Agreement referred to in paragraph 1 of the Statement of Claim and this was after the death of the purported vendor. Counsel argued that the defendant/appellant is in possession and the plaintiff/respondent did not receive conveyance before the death of the purported vendor and the receipts he received for payments

made for land were never produced. Counsel for the appellant complained that there was no evidence of the root of title of Kebbie Bangura (deceased) given by the respondent. Counsel submits that the learned trial judge, in considering the evidence before him applied the wrong principle of law, so the whole judgment cannot stand and should be set aside.

I am of the view that if Ground 6 succeeds the appeal should be allowed.

I will therefore consider the offensive passages of which Counsel has complained and relate them to the evidence.

The first passage states:

> "Before Kebbie Bangura's death there was a binding contract of sale by virtue of the payment and acceptance of the purchase money of Le210 as deposed by Dankay Bangura, PW3. The plaintiff thereby has an equitable interest in the land and Kebbie Bangura retained the legal estate. The legal estate could have been transferred to the plaintiff only by the execution of a conveyance. But the plaintiff having paid the purchase money he was the real beneficial owner of the property in dispute".

The learned trial judge has supported his finding with a passage he referred to in *Cheshire Modern Real Property* 7th Edition page 632 which reads:

> "But although the general rule is that the contract for the sale of land must be in writing, yet in certain circumstances a parol contract may become enforceable"

This provision, with respect to the trial judge, has been referred to in isolation without taking any proper cognizance of the requirement of s 4 of the Statute of Frauds 1677 or the certain circumstances which can make a parol contract touching land become enforceable. From the evidence before the lower court there was no Memorandum in Writing signed by the party to be charged, that is to say, Kebbie Bangura (deceased). There is evidence that the respondent had part performed the agreement by payment of the sum of Le210 to Kebbie Bangura. I am not quarrelling with the finding of the judge in this regard. But did this payment alone and to entry into possession give the respondent title to the land? I do not think so. The Deed of Agreement executed between the children and the next of kin of Kebbie Bangura (deceased) and respondent has no force in law and is unenforceable. It is neither a Memorandum in Writing as required by Section 4 of Statute of Frauds nor is it a Deed of Conveyance as provided for by the Conveyancing and Law of Property Act 1881, nor can the respondent enforce any agreement against the personal representative of Kebbie Bangura (deceased) before they have taken out Letters of Administration for his estate, if any.

What title had the respondent in the land? I do not think he had any. I believe the learned trial judge misdirected himself on the law of part performance forming the basis for a claim for specific performance. There was no claim for specific performance before the lower court and the Registration of the Deed of Agreement – Exhibit "A" did not pass any interest in the land. This in my view, with respect to the learned trial judge, is a misconception of the law relating to title to land.

The certain circumstances which can make a parol contract of sale regarding land enforceable are clearly set out on pp 632 and 633 of *Cheshire Modern Real Property* (ibid). They are:

> "If the party against whom it is sought to enforce the contract fails to set up the want of writing as a defence to the action, as in *James v Smith* (1891) 1 Ch 384; or
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> If he has fraudulently prevented the creation of writing evidence as in *Clarke v Grant* (1807) 14 Ver 519; or

If there has been a parol agreement that the estate which is to be conveyed absolutely to the purchaser shall be held by him on trust by the vendor as in the case of *Bannister v Bannister* (1948) 2 All ER 133; or

If the plaintiff can prove a sufficient act of part performance as in *Davies v Trefusis* (1914) Ch 788."

In this case the claim is by the plaintiff who is the purported purchaser. What the trial judge referred to above regarding an enforceable parol contract can only refer to parties to the contract. In the instant case, the appellant was not a party to the purported contract and even if he were, the "certain circumstances" listed above could not have applied to him, he was not the vendor. The learned trial judge, I regret to say, applied the wrong principle of law to an unenforceable contract, which in my view, was void ab initio.

In order to compound the misstatement and misapplication of law relating to title to land, I will refer to some other offensive passages in the judgment of the trial judge.

"I say with respect that, though the plaintiff died intestate and the question of executors does not arise, that was exactly what the plaintiff did without recourse to the courts, *viz* the "Deed of Agreement" – Exhibit "A" executed by the deceased's next of kin."

In this passage the judge confused the parties, that is plaintiff/respondent and the deceased who was the purported vendor and wrongly assumed that a Deed of Agreement, albeit, an unenforceable one, is a written memorandum as required by Section 4 of the Statute of Frauds 1677, or confers a legal estate in land on the personal representatives of a deceased person.

The judge went on to say "it is my view that by the very nature of the contents of the Agreement full notice was thereby given to the Registration Officer of the intention of the signatories to the instrument, that is to say to specifically perform a binding contract of sale of that piece of land." I have already dealt with this issue of specific performance. No such claim was made in the present case nor could it have been considered by the lower court as between the plaintiff/respondent and the defendant/appellant who was a stranger to the Deed of Agreement. I fail to see how the registration of the Deed of Agreement can confer a title to land if the purported vendor has no estate in the land.

This brings me to the issue of root of title to the land. Did the deceased have a title to the land which could have devolved on his personal representatives? If he had, had the personal representatives fulfilled the provisions of the law before attempting to convey to the plaintiff/respondent, that is to say, had they taken out Letters of Administration, since it was believed Kebbie Bangura died intestate?

The judge in his judgment had this to say:

"I must stress here that the grantors have not purported to convey a title they did not possess as in the case of *Adeshoye v Shiwonikn* [1952] KIV WACA 86. They hereby gave effect to a contract of sale between Kebbie Bangura (deceased) and the plaintiff entered into before the former's death".

Surely, with respect to the trial judge, he did not advert his mind to the root of title of Kebbie Bangura (deceased). Apart from the evidence of the plaintiff/respondent and PW3 there was no other evidence of root of title before the lower court. The first duty of the vendor is to prove that he is the owner of what he has agreed to sell. In this case Kebbie Bangura (deceased) should have shown the history of the ownership of the land for a period of at least 40 years to satisfy the provision of s 1 of the Vendor and Purchaser Act 1874. This was not done in the instant case and as such the contract of sale of the land between Kebbie Bangura and the plaintiff/respondent was of no effect. There is no evidence that Kebbie Bangura had

been in possession of the land for at least 40 years. The principle was clearly stated by North J in *Re Cox and Nevo's Contract* (1891) 2 Ch 109, 188:

> "And when I say a (40) years title I mean a title deduced for (40) years, and for so much longer as it is necessary to go back in order to arrive at a point at which the title can properly commence. The title cannot commence *in nubibus* at the exact point in time which is represented by 365 days multiplied by (40). It must commence at or before the (40) years with something which is in itself of which it is agreed shall be a proper root of title".

I agree with the law as stated by the learned judge in the above case and I find that the very foundation on which the claim was made did not exist. Kebbie Bangura (deceased) had no title to pass to plaintiff/respondent. The claim was based on title to the land but a claim for trespass can also be grounded on possession. Did the learned trial judge advert his mind to possession to found a claim for trespass? I do not think so. His finding in my view was based on title to the land which claim has failed.

There is a clear distinction between a claim for trespass based on title to land and that based on possession of the land. If the claim based on title fails, the court should proceed to examine the evidence regarding possession, if any. The standard of proof in a claim based on title to land is higher than that required in a claim based on possession. This was decided in the cases of *Henrietta Morgan and Another v Margaret Leigh* (Civil Appeal 2/75, unreported) and in the case of *Dunstan E John & Reuben Macaulay v William Stafford, Alfred George Nathaniel Cole & John Eddie Taylor* (Supreme Court, Civil Appeal 1/75, Betts JSC, unreported).

In the case of *Dunstan E John & Reuben Macaulay v William Stafford, Alfred George Nathaniel Cole & John Eddie Taylor*, above, Betts JSC said at p12 of the judgment:

> "In a claim for trespass the plaintiff need not prove title as stated in the case of *Goslyn v Williams* (1720) Fortes 378. Possession alone is indeed sufficient to sue in trespass as against a wrong-doer, but it must be clear and exclusive possession as Best CJ said in *Revett v Brown* 5 Bing 7".

I entirely agree with the principle of law herein stated, and would adopt it in the instant case. I accordingly adopt it. The evidence before the lower court revealed that the plaintiff/respondent was not in possession of the land at the time the institution of the action. There is no evidence that at the time of alleged trespass the plaintiff/respondent was in exclusive possession of the land. Therefore he cannot ground a claim for trespass based on possession.

I shall not consider the other grounds of appeal separately. I hold that ground 6 has adequately dealt with the points raised in grounds 1 to 5 inclusive.

The complaint raised under ground 6 is well founded and this ground succeeds accordingly. In view of what I have said supra, I will allow the appeal and set aside the judgment of the lower court. Appeal allowed. Judgment of lower court set aside.

Reported by Anthony P Kinnear