CORAM:

~~The Hon. Mr. Justice E. Livesey Luke, C.J. - Presiding~~

The Hon. Mr. Justice C.A. Harding - J.S.C., P.J.

The Hon. Mrs. Justice A.V.A. Awunor-Renner - J.S.C.

The Hon. Mr. Justice S. Beccles Davies - J.S.C.

The Hon. Mr. Justice S.C.E. Warne - J.A.

Sc. Civ. App. No. 11/81

MOMOH DOWU - APPELLANT

And

CHIEF SAMUKA KATEU & ORS. - RESPONDENTS

Garvas J. Betts, Esq. for the Appellant

Dr. H.M. Joko Smart for the Respondent

JUDGMENT of the Court written by E. Livesey Luke, the Presiding Justice, and which has been adopted by the whole Court read this 18th day of November, 1985, by C.A. Harding, J.S.C.: ~~Livesey Luke, C.J.:~~ This appeal concerns a dispute relating to farming land situated in the Nongowa Chiefdom Kenema District in the Eastern Province. The parties to the dispute are the people of Mano Kortuhun ("the Appellants") and the people of Komende Lowoma ("Respondents"). The Action was first instituted in the Nongowa Local Court in March, 1972 by the people of Lowoma against the people of Mano Kortuhun for planting in their bush (i.e. farm land) without authority. The disputed bush is situated between the two villages i.e. Komende Lowoma and Mano Kortuhun. The action was heard by the Nongowa Local Court between May and November, 1972. Judgment was given in favour of the people of Komende Lowoma in November, 1972. The people of Mano Kortuhun, appealed to the Group Local Appeal Court at Kenema. The appeal was heard by the Group Local Appeal Court consisting of six chiefs sitting at Kenema in September, 1973. In the course of the hearing of the appeal the Court accompanied by the parties and their witnesses visited the land in dispute. The Court delivered judgment in December, 1973, allowing the appeal and awarding compensation to the people of Mano Kortuhun. The people of Komende Lowoma appealed to the District Appeal Court. The District Appeal Court was presided over by Mr. M.O. Taju Deen, then Principal Magistrate, assisted by two assessors. The hearing of the appeal commenced in November, 1974 and concluded on 25th July, 1975

/2......

when the assessors gave their opinions. In the course of the hearing the Court visited the land in dispute on two separate occasions. The Magistrate delivered judgment on 22nd October, 1975 confirming the decision of the Group Local Appeal Court but making a supplementary order in relation to a portion of the land in dispute.

The people of the Mano Kortuhun being aggrieved by the decision of the District Appeal Court appealed to the Local Appeals Division of the High Court. The complaint of the appellants was directed against the supplementary order made by the District Appeal Court. The order of that Court was in the following terms:-

> "In accordance with S.33(1)(a) & (f) of Act No.20 of 1963, the District Appeal Court confirm the decision of the Group Local Appeal Court with the following supplementary order: From Lowoma up to Botey stream; from Botey to the path of the palm tree (i.e. the palm tree pointed during our second locus-in-quo) to be returned to the people of Lowoma as claimed by them as it had been previously given them by the people of Mano Kortuhun and they had been working on it for over 25 years now. The District Appeal Court is not going to upset the decision of the Group Appeal Court, but the swamp after road leading to the palm tree should go to the people of Mano Kortuhun and all lands from the palm tree leading to Mano Kortuhun belongs to the people of Mano Kortuhun. No order as to costs. Each party bears its own costs."

It will be useful to set out the grounds of appeal relied on by the people of Mano Kortuhun in their appeal to the Local Appeals Division of the High Court. They were as follows:-

/3......

"(a) The supplementary order made by the District Appeal Court is inconsistent with and derogatory of the decision of the Group Local Appeal Court, a decision which the District Appeal Court expressly stated it was confirming.

(b) The supplementary order is wrong in law in that in effect, it upturns and subverts the very decision which the District Appeal Court stated it was confirming.

(c) The said supplementary order is wrong and unreasonable and cannot be supported having regard to the evidence."

The appeal was heard by Golley J. (as he then was) sitting with two assessors, at Kenema in May, 1978. Judgment was delivered in December, 1978 allowing the appeal and setting aside the supplementary order made by the District Appeal Court.

The people of Komende Lowoma being dissatisfied with the decision of the Local Courts Division of the High Court appealed to the Court of Appeal. The appeal was heard by the Court of Appeal (Marcus Cole, Navo and Turay JJ.A) in October, 1980. The main contention of the appellant in the Court of Appeal was that any appellate court has jurisdiction to vary the decision of a lower court and that the District Appeal Court had acted within its powers in varying the decision of the Group Local Appeal Court. Judgment was delivered in October, 1981 allowing the appeal.

The people of Mano Kortumun have now appealed to this Court. [illegible] grounds of appeal were [illegible] on behalf of the appellants. Learned Counsel on both sides argued all of them before us. However it is unnecessary to deal with them individually. It will be sufficient to deal with the two important issues raised by the appeal, namely -

(i) Whether the order made by the District Appeal Court was indeed a Supplementary order

/4.....

(ii) Whether the evidence supports the supplementary order made by the District Appeal Court.

With regard to the first issue it will be recalled that in making its order dated 22nd October, 1975 (quoted above) the District Appeal Court relied on Section 33(1) of the Local Courts Act, (Act No. 20 of 1963) 1963. That subsection reads:-

"33(1) on an appeal any Appeal Court may -

(a) confirm the judgment, order or sentence of the Court below;

(b) substitute for the judgment, order or sentence of the Court below any judgment, order or sentence which might lawfully have been made at first instance;

(c) remit the case to the original court or any other court of similar jurisdiction for rehearing;

(d) make any such order as to costs of the proceedings both in the Appeal Court and in the Courts below as may be just;

(e) exercise any powers which might lawfully have been exercised by the Courts below;

(f) make any such supplementary or consequential orders as the justice of the case may require."

The Court stated that "in accordance with Section 33 1(a) and (f) of Act No.20 of 1963" it <u>confirmed</u> the decision of the Group Appeal Court "with the following <u>supplementary order.</u>" In other words, the Court, acting under sub-paragraph (1)(a), confirmed the judgment of the Group Appeal Court, and acting under sub-paragraph (1) (f), made a supplementary order. The Judge in the Local Appeals Division of the High Court held that the effect of the supplementary order made by the District Appeal Court was to

/5.....

derogate from the order of the same court confirming the judgment of the Group Local Appeal Court. The Court of Appeal on the other hand, held in effect that the order made by the District Appeal Court after confirming the decision of the Group Appeal Court was a consequential order.

Mr. Garvas Betts, Learned Counsel for the Appellants, argued before us that the effect of the supplementary order made by the District Appeal Court was to vary the order made by the Group Appeal Court. He submitted that the powers conferred by the various paragraphs of the subsection could not be exercised in such a way as to make contradictory orders or orders which have the effect of nullifying each other. He further submitted that the supplementary order made by the District Appeal Court had the effect of nullifying the order confirming the decision of the Group Looal Appeal Court.

Dr. Joko Smart, Learned Counsel for the Respondents, conceded that the District Appeal Court was inconsitent in using the word "confirm" followed by the word "supplementary". He however submitted that from the records, it was clear that the intention of the Magistrate who presided over the District Appeal Court was to accept only part and not the whole of the decision of the Group Appeal Court. He further submitted that the intention of the Magistrate was to accept the decision of the Group Appeal Court substantially and to vary it in order to accommodate the supplementary order following his visit to the land in dispute.

I shall first dispose of the question whether an Appellate Court acting under the powers conferred on it by Section 33(1) of the Local Court Act, 1963 can,while confirming the judgment of the lower court,proceed to make a supplementary order or a consequential order.

In my opinion supplementary or consequential orders are ancillary to an order confirming a judgment. Therefore a court has power to make a supplementary order or a consequential order after making an order confirming the judgment of the Lower Court (which for convenience, I shall call the "principal order").

But it is importamt to emphasize that a "supplementary order" and a "consequential order" are not one and the same thing. A supplementary order, as the name implies, is an order which supplies a defect in the p r i n c i pal o r d e r. On the other hand a consequential order is an order which follows as a result of the principal order.

Let me take for example a case for possession of a house, where the Lower Court granted possession of the house to the respondent and merely stated the street where the house is situated without stating the number of the house or its boundaries. In such a case an Appellate Court may supply the defect by making a supplementary order specifying the number of the house and/or describing the boundaries of the land on which the house is situated. The Court may at the same time make a consequential order, for instance ordering the appellant to refund to the respondent damages or compensation previously paid to him by virtue of a court order.

The next question is whether a supplementary order or a consequential order can conflict with or vary the principal order confirming a judgment. As stated earlier, a supplementary order or a consequential order is ancillary to the principal order. In my opinion therefore by their very nature a supplementary order and a consequential order are subservient and subordinate to the principal order and they cannot derogate from, or vary or conflict with the principal order. Therefore once an order has been made confirming a judgment of a lower court an Appellate Court may proceed to make orders ancillary to the principal order. Such orders may properly be called supplementary or consequential as the case may be. But the court may not make any such orders which have the effect of derogating from the principal order made. And the court may not get over this prohibition by the device of clothing the offending order as "supplementary" or "consequential". Similarly if the court substitutes a judgment for the judgment of the court below, it may not make any supplementary or consequential order which has the effect of derogating from the (main judgment (as substituted).

I shall now proceed to consider whether the "suplementary order" made by the Magistrate was indeed a supplementary order. The order has been set out above. The Magistrate stated in no uncertain terms that the District Court confirmed the decision of the court below. He said inter alia:- "The District Appeal Court confirm the decision of the Group Appeal Court........The District Appeal Court is not going to upset the decision of the Group Appeal Court".

It will be useful to set out the relevant part of the judgment of the Group Appeal Court. It will suffice to quote from the concluding paragraphs of the well reasoned and exhaustive judgment of the court.

They read:-

> "24. According to the full inspection of the respondents' boundary in this disputed bush we the members of this court, it was observed with grave concern that there is nothing to prove to we (sic) the members of this court that his boundary is the actual boundary between Komende and Mano Kortunhun as according to native law and custom we all know what should be on a boundary between two towns.
>
> ....
>
> 26. This court do believe when the appellant said one Moriba begged this bush for the people of Mano Kortunhun which is the natural home for (sic) the said Moriba. The appellant told this court that when this bush was given to Moriba, Moriba and his children planted cocoa there. The cocoa planted was inspected by we (sic) the members of this court and while on inspection the appellant told this court that they allowed Moriba who is their nephew and his children to plant cocoa in the said bush and therefore that will not mean that the people of Komende are the owners of the said bush because Moriba

Moriba planted cocoa there. According to native law and custom, a nephew will be given a bush from the maternal side and that nephew will not now claim that bush because of that. This court rely on it as fact that the bush was begged when the said cocoa was planted.

....

28. ....

This also proves to this court that this Soryama deserted village belongs to Mano Kortuhun.

29. That the boundary laid by the appellant Momoh Dowu of Mano Kortuhun from Mbote stream on to a bunch of bambo tree, on to the Gbondi tree, on with Mbote across the Mbote swamp, on to Mdorwei tree, on to the source of Songeyei, down with Songeyei running to Sorya, joining Yumbu stream straight with Yumba to the boundary is therefore accepted as the actual boundary in this disputed bush between Komende and Mano Kortuhun having carefully viewed the boundaries well according to native law and custom governing boundaries between two towns.

30. That the cocoa planted in the said bush by the late Moriba and his children which bush was begged from the people of Mano Kortuhun should from the date of this decision remain the property of the children of late Moriba.

Decision. In view of the above facts, findings, coupled with careful examination of this case, we the members of this court unanimously say without fear or favour that the respondent Chief Samuka Kateu is wrong..................

We also order that the decision of the Local Court has been reversed".

/9....

This was clearly a judgment upholding the boundaries claimed by the appellants, rejecting the boundaries claimed by the respondents, declaring that the land in dispute belonged to the appellants and at the same time declaring that the cocoa trees planted on the land were the property of the children of Moriba and finally dismissing the claim of the respondents.

That was the judgment against which an appeal was lodged to the District Appeal Court. And that was the judgment which the District Appeal Court confirmed. Having confirmed that judgment, the District Appeal Court then proceeded to order that a portion of land "be returned to the people of Lowoma as claimed by them". Without doubt this was an order granting part of the respondents' claim which had already been dismissed by the Group Local Appeal Court and which dismissal had been confirmed by the District Appeal Court. This was an order taking away from the appellants part of what had been granted them by the judgment confirming the dismissal of the respondents' claim. This was an order derogating from the judgment in favour of the appellants. In my judgment such an order could not by any process of reasoning be clasified as a supplementary or a consequential order. It was an invalid order and should be set aside.

Having reached this conclusion, it is not necessary to consider the second issue. I shall however deal with it very briefly. The respondents' claim was for the recovery of the land. The respondents' case was that they had acquired the land by conquest over seventy years ago, that is before the British declared a protectorate over that part of Sierrà Leone now known as the Provinces. The case for the appellants was that they had originally brushed the land and that there had never been any adverse claim against their right to the occupation of the land. So the issue between two parties was which of them had a better claim to the land. Starting from the Local Court and up to the District Appeal Court each party called witnesses to prove their respective claims and also to identify the boundaries of the land claimed by them. The Group Local Appeal Court exhaustively considered the evidence, in the course of which they rejected the

/11.....

evidence of the respondents and their witnesses including the evidence given by them relating to the boundaries, and accepted the evidence of the appellants and their witnesses including the evidence relating to the boundaries, and came to the conclusion that the land in dispute belonged to the appellants. The District Appeal Court also considered all the evidence including the evidence adduced before the Lower Courts and rejected the evidence led on behalf of the respondents and accepted the evidence led on behalf of the appellants. Indeed, the whole trend of the judgment of the District Appeal Court up to the stage at which the offending supplementary order was made was in support of the appellants' claim. *It seems illogical that having* discredited the evidence of the respondents, rejected their claim and given considerable weight to the evidence of the appellants, for the Court to then make an about face turn and say that part of the land belonged to the respondents.

It would appear that that change of front on the part of the District Appeal Court was as a result of the second locus in quo. It is not clear from the recorded evidence of that visit what factors influenced the Court. The reason given by the Court for giving part of the land to the respondents was that "it had been previously given them by the people of Mano Kortuhun and they had been working on it for over 25 years now". This reason is untenable for two reasons. First, it was not part of the case of the respondents that the land in dispute was given to them by the appellants. Their case was that they had acquired it by conquest. Secondly, the evidence does not support the assertion that the appellants had at any time given the land to the respondents. In fact the evidence of the respondents was that the appellants had never owned that land and that they (the respondents) had always owned it.

It is relevant to mention that the appellants admitted that they had allowed one Moriba, their nephew, to plant cocoa trees on part of the land. The respondents did not claim to derive their title through Moriba. So this admission was of no avail to the respondents. The Group Local Appeal Court held that the

arrangement between the appellants and ...

native law and custom, and proceeded to order that "the cocoa planted in the bush by late Moriba and his children" should remain the property of the children of late Moriba. It has not been suggested that this order was not in accordance with native law and custom. My understanding of the order of the Group Local Appeal Court is that the land is the property of the appellants but that the cocoa trees planted by Moriba on part of the land belong to Moriba's children. Accordingly the children of Moriba have the right of reaping the cocoa and generally enjoy the fruits of the cocoa trees but that does not mean that they are the owners of the land. This right, in my opinion, is in the nature of the right known in Roman Law as usufruct, Such a right is recognized by our customary law.

Before concluding this judgment, it is necessary to refer to an issue raised by the Court of Appeal in their judgment. The Court expressed the view that the respondents were entitled to the land in dispute by reason of long user. With respect to the members of that Court, that was not an issue before the Court of Appeal because it was never raised in either of the two Grounds of Appeal or canvassed before that Court. And in any case, the case advanced by the respondents and the evidence adduced do not warrant the application of that doctrine.

For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Local Division of the High Court setting aside the supplementary order made by the District Appeal Court and confirming the judgment of the Group Local Appeal Court.

E. Livesey Luke
Chief Justice.

I agree
I agree
I agree
I agree