SESAY v KARGBO & ORS

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Civil Appeal 1 of 1982, Hon Mr Justice E Livesey Luke CJ, Hon Mr Justice OBR Tejan JSC, Hon Mrs Justice AVA Awunor Renner JSC, Hon Mr Justice S Beccles Davies JSC, Hon Mr Justice MF Kutubu JA, 31 December 1984

[1] Land – Trespass – Unnecessary to prove ownership of land – Mere possession of land sufficient – Survey of land and warning off sufficient – Whether injunction appropriate

On 16 July 1976 the respondents (plaintiffs) took action claiming damages for trespass against the appellant (defendant) and sought an injunction against further trespass. The respondents claimed they were fee simple owners of land at Goderich Village by virtue of a deed of gift dated 9 April 1970. The appellant claimed in defence that it had acquired a fee simple title to the portion of the land on which it had built in 1972. The High Court dismissed the respondents' claim but the Court of Appeal allowed the appeal and awarded damages for trespass and injunction restraining further trespass.

Held, per AVA Awunor-Renner JSC, dismissing the appeal but setting aside the injunction:

1. It is not necessary to prove ownership of land in a claim for trespass. Trespass to land is an entry upon, or any direct and immediate act of interference with, the possession of the land.

2. Actual possession is a question of fact consisting of an intention to possess the land in question and exercise control over the land. The type of control will vary with the nature and use of the land in question. *Ocean Estates v Norman Pinder* [1969] 2 WLR 1359 applied.

3. The respondents did not need to take active steps to show that they were in possession. The slightest amount of possession is enough to maintain an action for trespass. In this case, the deed of gift was insufficient to prove that the respondents owned the land. However, the actions taken by the respondents in surveying the land and warning the appellant off the land in 1972 were sufficient to show that they were in possession of the land before the appellant and at the material time, and therefore they were entitled to succeed in action for trespass. *Bristow v Cormican* (1878) 3 AC 641, *RB Wuta-Ofei v Mabel Danquah* [1961] 1 WLR 1238 and *Dr CJ Seymour-Wilson v Musa Abess* (Supreme Court Civil Appeal 5/79, 17 June 1981) applied.

4. An injunction was not appropriate due to the respondents' conduct in this matter. Although the respondents had seen the appellant constructing a building on the land and even warned him off it in 1972, their solicitor did not write to him until the 16 July 1976 before a writ was issued against him. In those circumstances it was inequitable to order an injunction.

Cases referred to

Benmax v Austin Motors Co Ltd [1955] 1 All ER 366
Bristow v Cormican (1878) 3 AC 641
Dr CJ Seymour-Wilson v Musa Abess (Supreme Court Civil Appeal 5/79, 17 June 1981)
Ocean Estates v Norman Pinder [1969] 2 WLR 1359
RB Wuta-Ofei v Mabel Danquah [1961] 1 WLR 1238
Watt (or Thomas) v Thomas [1947] AC 484

Legislation referred to

Accra Town (Lands) Ordinance 1940 s 2(1) [Ghana]

Other sources referred to

Halsbury's Laws of England [3rd Ed] Volume 38 p 739 para [1205], p 744 para [1214]

Appeal

This was an appeal by Momoh Sesay from the judgment of the Court of Appeal on 4 March 1982 reversing the judgment of Thompson-Davis J on 27 November 1980, dismissing the claims of Amadu Kargbo, Fatu Kargbo and Beareh Conteh for damages for trespass to land, an injunction restraining the appellant from trespassing on the said land and for mesne profits. The facts appear sufficiently in the judgment of Awunor-Renner JSC.

Mr JB Jenkins-Johnston for the appellant.
Mr Leonard Williams for the respondent.

AWUNOR-RENNER JSC: This is an appeal from a judgment of the Court of Appeal dated 4 March 1982 reversing a judgment of Thompson-Davis J dated 27 November 1980, dismissing the respondents' claims for damages for trespass to land, an injunction restraining the appellant from trespassing on the respondents' land and for mesne profits.

The relevant facts of this case are as follows. The action was commenced by the respondents as plaintiffs by a writ of summons dated 16 July 1976. They claimed that at all material times before and during this action they were the fee simple owners of the land in dispute situated at Goderich Village in the Western Area of Sierra Leone. They further alleged that they became the fee simple owners of the said land by virtue of a deed of gift dated 9 April 1970 and registered as number 31 at page 11 in Volume 48 in the Book of Voluntary Conveyances kept in the Registrar General's Office in Freetown. The said deed of gift was duly produced at the trial in the High Court. I shall however deal with that later. It is also alleged by the respondents that when the appellant (defendant in the High Court) started to build on the said land they warned him that the land belonged to them and they even complained to the Police, but despite all warnings he continued to build and eventually they had to instruct their solicitor to write to him telling him that they were the fee simple owners of the land in question, and when he still persisted this action was then instituted against him.

The appellant did not give evidence but in his statement of defence he pleaded that he had acquired a fee simple title of the portion of the said land in 1974. He further stated that title to the piece of land had always belonged to the Fofanah family of which one Alieu Fofanah was head and that he will therefore strongly challenge the deed of gift dated 9 April 1970.

At the hearing of the action in the High Court only the first respondent gave evidence before the learned trial judge Thompson-Davis J. He, as stated supra, dismissed the respondents' claims. The respondents then appealed to the Court of Appeal and that court on 4 March 1982 set aside the judgment of the court below, allowed the appeal, awarded the respondents the sum of Le1,000 as damages for trespass, costs and an injunction restraining the appellant by himself or his servant or agent from trespassing on the said land.

The appellant has now appealed to this Court on several grounds asking for the following relief:

1. that the judgment of the Court of Appeal dated 4 March 1982 be set aside;
2. that the judgment of the High Court (Thompson-Davis J) dated 27 November 1980 be restored;
3. any further or other order as the court may seem necessary and equitable.

Various arguments have been adduced in this court on behalf of both the appellant and the respondents. Briefly on the one hand, Mr Jenkins-Johnston counsel for the appellant argued that the respondents had never claimed that they had been in possession of the land in question. In fact he said that this was the view held by the learned trial judge. He further submitted that in fact it was the appellant who had been in actual possession at the time of the alleged trespass. A further argument raised on the appellant's side is to the effect that the respondents had pleaded that they were the fee simple owners of the land in question by virtue of Exhibit A, the deed of gift. He contended that the evidence was not enough to support the alleged title to the land. The burden of proof, he further submitted, was on the person asserting title to prove such title in accordance with the pleadings and that the appellants, having based their rights to possession on the document in question, their case ought to stand or fall on the strength of the deed of gift. He further submitted inter alia that in a case of trespass, possession alone is sufficient to maintain an action as against a wrong doer but that such possession must be clear and exclusive. Appellant's counsel then endeavoured to show that the Court of Appeal was clearly wrong when they said that the respondents had made out a case and that there was no evidence on which that court could have found that they were in clear and exclusive possession of the land in question and that they were therefore wrong to have reversed the decision of the trial judge.

He also cited several authorities in support of his contentions to show the circumstances when an appellate court could reverse the findings of a lower court.

The main arguments put forward by Mr L Williams, counsel on behalf of the respondents, were as follows.

Firstly what must the respondents prove to succeed in an action for trespass? He submitted the respondents had in fact proved their case since he claimed that actual entry as such by the respondents was not necessary in law to maintain an action for trespass, but as against a wrongdoer the slightest act of possession by the respondent is sufficient for them to maintain an action for trespass.

He further contended that even if the respondents' title is defective, though he was not conceding this, the court should interpret the conduct of the respondents as to whether those acts amounted to the assertion of a possessory title to the land in dispute. The main question, he further submitted, was who had a better right to possession, the appellant or the respondents?

He finally referred to circumstances when the Court of Appeal could interfere with the findings of fact of a trial judge and referred the court to the case of *Watt (or Thomas) v Thomas* [1947] AC 484 and *Benmax v Austin Motors Co Ltd* [1955] 1 All ER 366 at p 329.

Having narrated the arguments put forward by both counsels for the appellant and the respondents it now becomes necessary for me to consider the evidence adduced in this case, together with the law on the points raised and the authorities relied on by both counsels.

The first point which I now have to consider is the question of whether either party proved that they had a better title to the land in question. I do not intend to lose sight of the fact that this was an action for trespass. However the respondents in their statement of claim had pleaded that at all material times before and during the action they had been the fee simple owners of the land in dispute by virtue of a deed of gift, Exhibit A dated the 9 April 1970 and registered as number 31 at page 11 in Volume 48 in the Book of Conveyances kept in the office of the Registrar-General in Freetown. The deed of gift was also relied on at the trial and tendered in evidence. In fact at the trial and under cross-examination, the first respondent had this to say:

> "I did not buy the said land. It was my uncle who gave it to me. He is Pa Alieu Fofanah. He himself gave me the land. Pa Alieu Fofanah is now dead. Died long ago. I cannot remember when. I am not literate in English. Fofanah gave me the land by means of Exhibit A. I cannot remember when Pa Fofanah died. My uncle did not die in 1970 he died after 1970. Before my uncle died, he made a small document which was a deed of gift. He died and we found a surveyor. He surveyed the whole compound. He then prepared a plan and gave us a copy. We then prepared the documents for registration. The document was then registered. It was after the death of Pa Alieu that we made Exhibit A. It contains Fatu Kargbo, Beareh Conteh and my name."

He continued further in his evidence by stating as follows:

> "I know Salifu Koroma. I would know him. Exhibit A does not say that Salifu Koroma gave us the land. I would agree with you that Salifu Koroma did not give any land at Goderich."

The trial judge in his judgment had this to say about these pieces of evidence given by the first respondent herein:

> "The case for the plaintiff is a most curious one and to say the least a calamity. They have not attempted to prove this case against the defendant, indeed they have proved and achieved nothing. Exhibit A is to my mind a spurious document and an affront to the integrity of this court. The plaintiffs have dismally failed to prove their case and their claim against the defendant fails."

The appellant on the other hand did not give any evidence, neither did he tender in evidence any document in support of the allegation in his statement of defence that he had acquired a fee simple title of a portion of the said land. In fact no reason was given for the non-production of any document to support his allegations.

I take it therefore to be clear that, since the respondents in this case were claiming that they were the fee simple owners of the land in question, they had to prove that they had title in themselves or through some person from whom they were claiming and the question was whether they had in fact done so; that would of course depend on the evidence actually adduced.

It is now necessary to examine the deed of gift, Exhibit A, on which the respondents are relying and which purports to convey the land in question to them. The first respondent who testified before the High Court and produced it claimed inter alia:

> "I know Salifu Koroma. He sold the land in question to my uncle Pa Alieu Fofanah. Land is at Goderich. My uncle made a will leaving the said land to us in the event of his death."

In continuing his evidence he said:

> "Did speak of a will. See this document it is a deed of gift, wish to produce. Marked "A".

On these pieces of evidence quoted above I cannot see how anyone could attach much credence to Exhibit A. What is contained in it is in direct variance with the oral evidence of the first respondent. The deed of gift was supposed to have been executed by one Salifu Koroma on 9 April 1970 when in fact in his evidence the first respondent had testified that the land in question had been sold to his uncle Pa Alieu Fofanah by Salifu Koroma and that his uncle had made a will leaving the property in question to them. Later on he had alleged that his uncle had died after 1970 but that before he died, he had given them the property by means of a small document which was a deed of gift. After his uncle died, they engaged a surveyor to survey the land and prepare a plan. A deed of gift was then prepared to which the plan was attached. That deed of gift was tendered in evidence by the first respondent and marked Exhibit A. On this sort of evidence I fail to see how the respondents could claim the land as fee simple owners. In my view the document is a useless one and cannot be relied upon to prove ownership of the said land.

Let me at this stage point out that it is not necessary to prove ownership of land which is the subject matter of dispute in an action for trespass as in this case. This is an action for damages for trespass to land. Trespass to land is an entry upon, or any direct and immediate act of interference with, the possession of land. Trespass to land is defined in *Halsbury's Laws of England* [3rd Ed] Volume 38 at p 739 para [1205] as follows:

> "Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies although no actual damage is done. A person trespasses on land if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession or place or fixes anything on it."

Also in the same volume of *Halsbury's Laws of England*, supra, at p 744 para [1214] it is also stated as follows:

> "Trespass is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who was, or who is deemed to have been in possession, either actual or constructive of the said land at the time of the trespass. The type of conduct necessary to evidence possession varies with the type of land; and to maintain an action against a person who never had any title to the land, the slightest amount of possession is sufficient."

In the case of *RB Wuta-Ofei v Mabel Danquah* [1961] 1 WLR 1238, the matter concerned land at Christiansborg, Accra, which the respondent in that case alleged in accordance with native custom was included in land which was granted to her by the Stool of Osu in 1939 in accordance with s 2(1) of the Accra Town (Lands) Ordinance 1940, vested in the Chief Secretary in trust for his Majesty. In 1956 a divesting order was made releasing the suit land. Notwithstanding the Ordinance of 1940 the respondent had had her original gift confirmed in 1945 by an indenture which was duly registered. In 1948 the appellant (who pleaded a grant of the land to him by the Osu Stool prior to that of the respondent) having erected a building on the land, the respondent claimed against him inter alia, damages for trespass. Until 1948 the said land was vacant and unenclosed, but the respondent deputised her mother to look after this plot and keep watch on it to see that no one intruded. The appellant contended that there was no evidence to establish that the respondent was in possession at

the date of his entry on the land in 1948 and that assuming that she was in possession before the date of the Ordinance in 1940, her possession was determined thereunder and she had taken no active steps thereafter to reassert her possession.

It was held: (1) that while s 2(1) of the Ordinance determined her possession it did not affect the factual aspect of possession if she was in actual possession at the date of the Ordinance, the section did not change that state of facts; (2) that to establish possession it is not necessary for a claimant to take some active step in relation to the land such as enclosing or cultivating it. In the case of vacant unenclosed land which is not being cultivated little can be done on the land to indicate possession. The type of conduct which indicates possession must vary with the type of land. Here the type of possession which the respondent sought to maintain was against the appellant who never had any title to the land, and the slightest amount of possession would be sufficient to entertain a claim for trespass. In *Bristow v Cormican* (1878) 3 AC 641at p 657, Lord Hatherley said:

> "There can be no doubt whatsoever that mere possession is sufficient against a person invading that possession without himself having any title whatsoever, as against a mere stranger; that is to say that is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

The principles in both *Bristow v Cormican* and *RB Wuta-Ofei v Mabel Danquah*, supra, were also illustrated in the decision and reasoning in the House of Lords in the case of *Ocean Estates v Norman Pinder* [1969] 2 WLR 1359 at p 1364.

Actual possession is a question of fact which consists an intention to possess the land in question and exercise control over the land. The type of control which should be exercised over the land would vary with the nature of the land and the use made of the land in question. See the case of *Ocean Estates v Norman Pinder* [1969] 2 WLR 1359 supra. As indicated earlier counsel for the appellant had maintained that there was not sufficient evidence to establish that the respondents were ever in possession of the land at the critical period and that they had never pleaded that they were ever in possession of the disputed land. No authority was cited by counsel for the appellant in support of the contention that the respondents must plead that they were actually in possession of the land in question. In fact I myself have been unable to find any.

This to my mind I would therefore say is unnecessary in view of the principles contained in the case of *Dr CJ Seymour-Wilson v Musa Abess* (Supreme Court Civil Appeal 5/79, 17 June 1981) and in the cases mentioned supra as to who was in fact in possession of the said land and bearing in mind the principle that the slightest amount of possession is enough to maintain an action for trespass.

At this stage it now becomes necessary for me to consider on the evidence before the court which of the two, the appellant or the respondents, had a better right to possession of the land in question. As I have already stated above the appellant did not give any evidence and neither was any evidence adduced on his behalf. The only witness who gave evidence was the first respondent. He testified that the land was given to him and the other two respondents by his uncle one Salifu Koroma who died after 1970 but that after the death of his uncle they had procured the services of a surveyor to survey the whole compound and prepared the plan of the land. He then gave us a copy. The plan was attached to Exhibit A. The surveyor signed and dated the plan on 20 March 1969. From this it can be inferred that the respondents exercised acts of possession over the land in March 1969 through their agent and the surveyor and that sometime in 1972 he found the appellant building on the land and that he told him that they owned the land in question.

Let me at this stage quote the relevant portion of his evidence.

> "I recall 28.4.74 and also remember what happened in 1972. Sometime that year I found Momoh Sesay in Goderich. He built a house on the land. He built the house in 1972. I told him that he had no right to be on the land and that we owned it. He said that he bought it from one Pa Abdulai Fofanah. I told him that Pa Abdulai Fofanah does not own the land. I went to the CID and reported him as he refused to quit the land. One Pa Momoh Bangura, my brother, went

with us. The defendant was called to the CID and questioned. He said that he had bought the land from Pa Abdulai Fofanah."

Apart from this there is evidence also that although the appellant was warned to get off the land he nevertheless continued to build on the land until the building was completed and that thereafter the first respondent instructed his solicitor to write to the appellant about the matter. When he still continued to occupy the land action was then instituted against him.

In my view having considered the whole of the evidence adduced in this case and especially those referred to above, together with the authorities cited by me, I am satisfied that the respondents had entered into possession of the land before the appellant did. They did not have to take active steps to show that they were in possession: *RB Wuta-Ofei v Mabel Danquah*, supra. The principle that mere possession is sufficient to maintain an action for trespass has been approved in *Bristow v Cormican* supra, and in several other cases. The actions taken by the respondents in surveying the land and in warning the appellant off the land in question is I think adequate to show that they were in possession before the appellant entered upon the land in dispute and that they were merely trying to assert their claim to possession of the said land. For these reasons I hold that the respondents had a better right to possession and were therefore entitled to succeed in an action against the appellant for trespass.

By way of summing up I would pose the following questions which are as follows:

Have the respondents proved their claim as contained in the writ of summons? I would certainly not hesitate to say that on the evidence adduced at the trial that they have failed dismally to prove that they were the owners in fee simple of the land in question. As regards the question of whether they were in fact in possession of the said land at the time of the alleged trespass? I have carefully considered the principles of law involved, the arguments adduced by both counsel together with the evidence and have come to the conclusion that the respondents were in fact in possession of the land at the material time.

The second question which I have to answer is whether the trial judge was right in dismissing the action? It follows from what I have already stated above that the trial judge was right as far as ownership of the land based on the deed of gift is concerned but that he was wrong as far as the question of possession of the land is concerned.

Having come to this conclusion my last and final question is: was the Court of Appeal right in reversing the decision of the learned trial judge? As regards the question of trespass I would say yes. As regards the question of whether the Court of Appeal was right in reversing the decision of the trial judge I would also say yes.

It was stated in the head note of the case of *Watt (or Thomas) v Thomas* [1947] AC 484 that:

"When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

As I have already stated there is no doubt that a case of trespass has been made out by the respondents against the appellants. In my opinion the respondents have proved that they were in possession of the land in question at the material time. The Court of Appeal also came to his same conclusion. In fact this is what During JA had to say in his judgment:

"In our view the learned trial judge was wrong in holding that the appellant had failed to make a case of trespass. The appellants in fact proved their case."

The Court of Appeal having concluded that the learned trial judge was wrong in his findings as regards the question of trespass were clearly entitled to reverse the learned trial judge's findings of fact on the question of what has been proved or not proved.

As regards the question of granting an injunction I do not think that it is appropriate for me to grant it because of the respondents' conduct in this matter. The court must look at the particular circumstances in each case. The evidence reveals that although the respondents had seen the appellant constructing a building on the land and even warned him off in 1972, their solicitor did not write to him until the 16 July 1976 before a writ was issued against him. In those circumstances it will be inequitable to order an injunction. I must under the circumstances disagree with the Court of Appeal in this regard and refuse to grant the injunction claimed.

For the reasons which I have already given above, I have come to the conclusion that this appeal should be dismissed subject to an order setting aside the injunction granted.

Costs to the respondents.

Hon Mr Justice E Livesey Luke CJ: I agree. **Hon Mr Justice OBR Tejan JSC**: I agree. **Mr Justice S Beccles Davies**: I agree. **Mr Justice MF Kutubu JA**: I agree.

Reported by Caroline AB Sesay