IN THE SUPREME COURT OF SIERRA LEONE

SC. CW APP. 1/96

FREDERICK MAX CAREW - APPELLANT

AND

DR. P.K. LAVAHUN - RESPONDENT

CORAM:

HON. MRS. JUSTICE S. BASH-TAQI	-	JSC
HON. MS. JUSTICE S. KOROMA	-	JSC
HON. MRS. JUSTICE V.A. WRIGHT	-	JSC
HON. MR. JUSTICE M.E. TOLLA THOMPSON	-	JSC
HON. MR. JUSTICE SEMEGA-JANNEH	-	JSC

N.D. TEJAN COLE ESQ.	..	FOR THE APPELLANT
J.B. JENKINS-JOHNSTON ESQ.	-	FOR THE RESPONDENT

JUDGMENT DATED 21ST DAY JANUARY 2010

WRIGHT, JSC – This is an Appeal from the Court of Appeal.

In this case the Appellant issued a Writ of Summons on the 26th September 1988 against the Respondent claiming damages for trespass on his land, declaration of title and injunction.

On the 22nd March 1991 the High Court dismissed the case of the Appellant after which the Appellant filed an appeal against the judgment of the High Court to the Court of Appeal.

The Court of Appeal gave judgment in favour of the Respondent confirming the High Court judgment on one of the eight grounds of appeal.

The Appellant being dissatisfied has appealed to the Supreme Court.

4. The grounds of appeal are:-

(1) The Court of Appeal erred in law in that it proceeded on the hypothesis that the Appellant herein in the Lower Court endeavoured to prove that the Respondent had trespassed upon his land. The Court then wrongly applied elements of or test for Declaration of title instead of trespass to land.

(2) The Court of Appeal was wrong in law in that it did not consider at all the claim for a Declaration of title by the Appellant.

(3) Instead, the Court of Appeal based its judgment solely on the question of trespass to land whereas the High Court:-

(a) Dismissed the claim for Declaration of Title on documentary evidence.

(b) Gave judgment to the Respondent for possessory title based partly on documentary and party on possessory evidence. Notwithstanding there was no counter-claim.

(c) Did not advert its mind at all or consider any or all the essential elements pertaining to an action for trespass which was also a relief sought by the Appellant.

(4) The Court of Appeal was wrong not to have considered and pronounced whether the learned trial Judge was correct when he declared the Respondent the owner of the disputed land. It is submitted:-

(a) There was no counter-claim by the Respondent to justify such a decision.

(b) The erroneous decision was partially based on a supplementary Deed of Conveyance which was not pleaded or for which an amendment of the statement of defence was sought for, granted, delivered and filed.

(5) The Court of Appeal also erred in that it ought to have considered and decided the effect or consequences on:-

(a) The admission of, reception and use thereof of the Supplementary Deed (Exhibit P or Q) when it was purported to have been executed on 13th September 1989 but only registered on 25th September 1989, outside the 10 days permitted by Sub-section 2 of Section 4 of the Registration of Instruments. (Amendment) Act 1964-Act No.6 of 1964.

(b) The correctness, interpretation and application of the Statutory Mandatory Provision of Section 12 of the Registration of Instruments Acts, Chapter 256 of the Laws of Sierra Leone, to wit, and Instrument under the Act must have on the margin or back, or annexed thereto a plan with description of the land in the Instrument and so signed by the person who made it.

(c) The evidence weight to, be given in respect of a recital in a Deed of Conveyance.

(6) The Court of Appeal also erred in that it did not consider and ought to have decided whether the learned trial Judge was:-

(a) Right when it dismissed the case of the Appellant on documentary and possessory evidence.

(b) Right to have based its judgment against the Appellant on the strength of the title of the Respondent and not other way round.

(7) The Court of Appeal ought to have reviewed the evidence and to reach its own conclusion particularly the evidence of the two surveyors. The Lower Court misunderstood the evidence.

(8) That the Court of Appeal ought to have considered the seven other grounds of Appeal by the Appellant. In not doing so, it denied the Appellant of the benefit of a Judgment.

(9) That the decision of the Lower Court is unreasonable and cannot be supported by the evidence.

(10) That the judgment of the Lower Court is against the weight of the evidence.

I feel it is important to set out in extenso the particulars of the Appellant's claim as indorsed in the Writ of Summons and the defence filed by Respondent in answer to the Respondents claim:-

(a) The Appellant's claim in the High Court was for damages for trespass to the Respondent's land.

(b) An injunction restraining the Defendant, his Servants or Agents from trespassing on the Appellants land.

(c) For a declaration for the Appellant's title to land in dispute.

(d) For a declaration as void an Indenture of Conveyance dated 26th November 1986 made between Francis Mischeck Minah and Dr. Patrick Kosabi Lavahun (Respondent here) and registered as No. 181 at page 58 In Volume 395 in the Book of Conveyances kept in the office of the Registrar-General, Freetown.

The defence filed on behalf of the Respondent is as followed:-

1. The Defendant cannot admit or deny paragraph 1 of the Particulars of the statement of claim and puts the Plaintiff to strict proof of the facts thereof.

2. The Defendant makes no admission with regard to paragraphs 2,7,3 of the said particulars, save that on his return to Freetown after a visit to Bonthe on or about the 24th March, 1988, he received a letter in his surgery signed by the Plaintiff dated 22nd March, 1988.

3. The Defendant says in further rebuttal of the said paragraph that at no time did he instruct any one to work on the Plaintiff's land and that at all material times, the only land he had instructed someone to work on

was and is his own land, of which he has and is seised in possession and otherwise well entitled by virtue of conveyance No.1818/86 dated 26th November 1986 expressed to be made between the Francis Mischeck Minah and the said Defendant.

4. The Defendant denies that the Plaintiff contacted him and verbally requested Defendant to stop construction as alleged because such work was being done on the Plaintiff's land.

5. The Defendant denies so much of paragraphs 5 and 6 of the Particulars of Claim that alleges that he and the Plaintiff met with two Police Officers and the Defendant's and Plaintiff's Surveyors on the land belonging to the Defendant and claimed by the Plaintiff, or the B.A. Thomas, a surveyor, or anyone else told the Defendant that the land he was claiming to be his, was the Plaintiff's land or that it was agreed on that occasion or at any time, that both Defendant's surveyor and Plaintiff's surveyor should get together and clearly and properly demarcate or locate the respective lands claimed by both Plaintiff and Defendant.

6. The Defendant accepts that what the said B.A. Thomas said was that he was going to ascertain who was the true owner of the said land referred to and the Defendant also avers that the Plaintiff without his permission took the said B.A. Thomas, and a second man to the Defendant's land, and proceeded to carry out certain measurements of it, without his permission at a time when the Defendant and his surveyor were present on the said land.

7. With reference to paragraph 7 of the Particulars of Statement of Claim, the Defendant admits only to receiving the letter referenced and dated as alleged.

8. As to paragraph 7 the Defendant admits that he initiating the building of a permanent concrete structure, but say that the land on which he erected the said structure was his own land as averred in paragraph 3 here and denies that that said land was the Plaintiff's or that he had made any verbal or other agreement with the Plaintiff as to the said land.

9. The Defendant further denies that if he ignored the Plaintiff's said letter, (which is not admitted) he was justified in law to do also as the land belonged to him.

10. The allegation of trespass to the extent of 0.3178 acres or at all by the Defendant himself, his servants or agent in paragraphs 8 and 9 of the Particulars of Claim is denied.

11. Further, and/or in the alternative, the Defendant maintains that the right (if any) to bring the action herein referred to in the Statement of Claim did not first accrue to the Plaintiff within 12 years before the commencement of this action and the Plaintiff's alleged claim was and is barred by the relevant provisions of the Limitation Act, Act No.51 of 1961.

12. Further, and or in the alternative, the Defendant will rely on the relevant provisions of the said Limitation Act to bar the Plaintiff's claim in trespass.

13. Save as hereinafter expressly admitted, the Defendant denied each and every allegation in the Statement of Claim as if the same were hereinbefore set out and traversed seriatim.

In giving judgment in favour of the Respondent the learned trial Judge found as a fact that the Appellant failed to establish that the Respondent trespassed on the Appellant's land.

The learned trial Judge concluded as follows:-

> *"The question is: If F.M. Minah who sold to the Defendant did not encroach on the Plaintiff's land how can the Plaintiff be heard to say that the Defendant has encroached on his land by buying from F.M. Minah? My answer is unless and until the Plaintiff has proved that the place where the Defendant is putting up a building is not the one sold to him by F.M. Minah, the Plaintiff cannot be heard to complain against the purchase of the disputed place by the Defendant. I pause here to say that the Plaintiff's case is far from establishing this important fact and that on this score alone, the Plaintiff claim against the Defendant ought to fail".*

When the matter came before the Court of Appeal, E.C. Thompson-Davis J.A. (as he then was) in delivering the reasons for the judgment of the Court of Appeal on the 28th March 1990 said:-

> *"It is quite easy to see that the Plaintiff's surveyor was never in a position to apply the principle in the Kwadzo v Adjei case 10 W.A.C. Ap.274 he could not accordingly give a true identification of land or produce accurate plan from the records of the land claimed by the Appellant. In one breath he was saying that Exhibit 9 shows that the property claimed by the Defendant forms part of the Plaintiff's land and in another breath he was saying that according to Exhibit H which he himself prepared, the distance of the Appellant's and Respondent's land was 195 feet".*

It is apparent that that Appellant did not resist the Respondent's claim for such a declaration but the Respondent must satisfy the Court that he is entitled to such a declaration before it could be property made.

After carefully considering the various contentions and arguments of the parties I must say that the only problem in this Appeal is more the identity of the land of

both parties which I do not find any difficulty in solving it.

Webber C.J. in the West African Court of Appeal case of Kodolinye Vodu (1935) 5 WACA 336 said:

> *"The onus lies on the Plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the Defendant's case. If this onus is not discharged, the weakness of the Defendant's case will not help and the proper judgment is for the Defendant. Such a judgment decrees no title to the Defendant, he not having sought the declaration".*

C.J. Livesay Luke also cited the above in the Seymour Wilson v Musa Abess (Supreme Court Civ. App. 5/79. Judgment delivered 17/6/81 unreported.

I disagree with learned Counsel for the Appellant that the Court of Appeal erred in law for failing to consider only one of the seven grounds of appeal. I hold that the Court of Appeal had every right to consider only one ground if they felt it necessary to dispose of the appeal. There is no doubt that an Appeal Court can and may, dispose of an appeal on a single ground of appeal if the failure of such ground is sufficient to dispose of the entire appeal. In the Court of Appeal, the disposal of the appeal was rightly based on the failure of Mr. F.M. Carew the Appellant to discharge the onus of establishing the identity of the land he is claiming which forms the fundamental basis of the raison d'etre of all his claims.

With the greatest respect to the learned Justice of Appeal it is not sufficient for an Appellant's claim for a piece of land to be supported by uncontroverted evidence to entitle that Plaintiff to such a declaration. See (Supreme Court Judgment SC. Civ.

App.7/2004 judgment delivered on the 16th March 2007 between Sorie Tarawalli and Sorie Koroma (as administration of the estate of Sorie Mansaray. Quite a lot of cases reviewed by this Court in Macauley v Stafford and Ors (SC. Civ. App. No.1/73) judgment delivered on the 13/7/76, unreported and in the leading authority of Wilson v Musa Abess (Supra) established that in an action for a declaration of title the Plaintiff must succeed on the strength of his title and not on the weakness of the Defendant's title.

In a case for trespass all the Plaintiff has to prove is a better right to possession than the Defendant. One way to do this is to show that he has a better title to land.

According to Livesay Luke in Seymour Wilson case (supra):

> *"But better title in the contest of an action for trespass is not necessarily "valid' title. In a case for trespass the Court is concerned only with the Relative strengths of the titles or possession proved by the rival claimants. The party who proves a better title or a better right to possession succeeds, even though there may be another person, not a party, who has a better title than he".*

In my view, there is a misapprehension of the decision of the High Court in so far as there is the understanding that it ***"gave Judgment to the Respondent (Dr. P.K. Lavahun) for possessory title".*** Dr. Lavahun, it must be noted, never claimed or counter-claimed for any relief, or for that matter, a declaration of title; and none was granted by the High Court. The misapprehension seemed to have arisen from the High Court Judge's assessment of the evidence relative to the land of the respective parties by his conclusion; and I quote:

> "The straight forward evidence given by D.W. 1 (Francis D Davies the Defendant's surveyor) has left me in no doubt whatsoever that

the Defendant is the rightful owner of the property in dispute and that he has a better right to possession than the Plaintiff (Mr. F.M. Carew) who has not established his right to it. In the circumstances, the Plaintiff's case is dismissed with costs"

Immediately preceding the above quotation, the High Court Judge in his assessment of the evidence stated:

"I hold that the gaps created in the Plaintiff's case go beyond a mere Failure to prove the Plaintiff's root of title to the place being claimed By the Defendant. In my view, the evidence of P.W. 2 (Mr. Benoni Thomas, the Plaintiff's surveyor) makes the identity of the land in dispute to be in doubt and not definite. I will therefore dismiss the Plaintiff's claim for declaration of title and trespass. I will also dismiss the claim for injunction as well".

(Brackets provided)

In all of this it can be clearly discerned that the High Court Judge ended by dismissing the Plaintiff's claims and case. He was concerned in giving his reasons for dismissing the Plaintiff's claims and case. At no instance did the High Court Judge grant to Dr. Lavahun (the Respondent) judgment for possessory title or a declaration of title to the land he built upon or any land for that matter. The judgment dismissed the Plaintiff's claims/case; nothing more.

Let me now turn to the identity of the lands of both the Appellant and the Respondent, and the alledged trespass on the Appellant's land.

Both the Appellant and the Respondent gave evidence during the trial. At the trial evidence called in support of the Appellant's and Defendant's case were the testimony of Allieu Badara a Clerk at the Registrar-General's Office who produced and tendered Exhibit A which was the Conveyance dated 14th August 1980 made

between Ex. P.C. Yumkella and the Plaintiff Registered as No. 964 at page 63 in Volume 321 in the Book of Conveyance. Certified Copy marked Exhibit B. Exhibit C which was a Conveyance dated 26th November 1986 made between Hon. Francis Mischeck Minah and Dr. Patrick Kosabei Lavahun registered as No. 1818 at page 58 in Volume 395. Conveyance between Selina Pearson and Chief B.S. Yumkella registered as No. 282/64 in Volume 213 marked Exhibit D. Conveyance between Clarice Davies and Phillis Burney-Nicol registered as No. 500/70 at page 10 in Volume 248 marked Exhibit E and finally by a Conveyance between Phillis Burney-Nicol and Francis Mischeck Minah registered as No. 547/71 at page 57 in Volume 248 marked Exhibit E. Exhibit F was also tendered Other Conveyances tendered Exhibits and Plans were Exhibits G, P and Q.

P.W. 2 Benoni Thomas said in his evidence, who was the surveyor for the Appellant that he went to the land in question with the Respondent's surveyor and they promised to return to the site. He said that he saw the plan in Exhibit C. The plan shown on Exhibit C is well out of the grit, within which the Defendant's land falls on the Eastings is within 41.700 feet and 41.900 feet on the Northings it is within 648.950 feet and 649.170 feet whiist the drawing on Exhibit F has at Eastings 40,800 i.e. and 41.400 feet.

On the Northings it is within 649.600 feet. So the plan on the Defendant's conveyance Exhibit C is on the South East of Exhibit F. He said that therefore the plan in Exhibit C could not have come from the land to F.M. Minah from whom he derived title.

They revisited the site again alone to make a complete survey of the adjacent properties including those of the Respondent, and were able to produce a Plan

which was Exhibit G. He said that at the time of preparing Exhibit G the building on the land had progressed to window sill level. This was indicated in the plan. He said that he consulted various Plans and Title Deeds. He said that Exhibit G shows that the property claimed by the Respondent forms part of the Appellant's land of which the area is 0.2531 acres. This being the actual physical position between the Appellant's land and that of the Respondent. Later in his evidence he said he prepared another Plan according to the co-ordinates and bearing on the various exhibits as shown in Exhibit H, the distance between the Plaintiff's land and the Defendant's land is 195 feet. He said that:

> *"It is clear that Exhibit G should have shown the grids, longitudes and latitudes so we would have known on whose land the actual encroachment had been".*

It should be noted that on re-examination he said *"the methods adopted in preparing Exhibit B and D are different. It would be difficult to pinpoint the exact position of one plan in relation to the other. The plans on Exhibits F, G, and M are co-ordinate plans and so one cannot easily determine the exact differences between one plot and the other The plots of land shown on Exhibit H are the Plaintiff's land and the Defendant's land is far apart on paper".* He also said that he did not lay hands on 10/9/72 referred to in Exhibit C and that Plan LS No.10/9.72 was not taken into account in his compilation.

The Appellant in person during his address said:- *"I submit that your Lordship should hold that the proper root of title has been established by the Plaintiff. On the contrary when you examine the Defendant's root of title looking at Exhibit C you will find that one Clarice Davies was the administrarix of the estate of Selina Pearson. The Defendant derives title from Clarice Davies because Clarice Davies sold to one Phillis Burnely-Nicol and the latter sold to Francis M. Minah. This was as from*

1971/72. The Defendant has not shown any master plan or conveyance belonging to Selina Pearson from which her daughter Clarice Davies derived title".

D.W 1 Francis Davidson During said *"The result of my findings is that the Respondent's land is far away from the Appellant's land. The distance between the Plaintiff's land and the Defendant is 210.9 feet from the beacon FC 1022 of 86 and 209.1 feet from beacon FC 1021 of 86 to SJ 188.1 got the legal seal number 548/80 from the drawn plan presented to me by Lavahun LS 1423 of 86. I got it from the plan. There is no overlap shown in Exhibit H between LS 1423 of 86 and LS 586 of 8. I employed Theodolite in the survey of the Defendant as against that of the Plaintiff. Theodolite is the most accurate instrument that a surveyor can use before he can do an accurate job".*

Livesay Luke in Seymour Wilson case supra said:

> *"But better title in the context for an action for trespass is not necessary valid title. In a case for trespass the Court is concerned only with the relative strengths of the titles or possession proved by the rival claimants. Party who proffers a better title or a better right to possession succeeds, even though there may be another person not a party who has a better title that he".*

On the available evidence what conclusion can this Court, as a Court of rehearing, reach as to location and identity of the subject matter of the trespass by the Appellant as alleged by the Respondent?

I have earlier quoted the evidence of P.W 2 in which he said there was an encroachment of 0.25.13 acres by the Respondent into the Appellant's land. D.W 2 said *"I see Exhibit H. There is nothing. I disagree with Exhibit H. Yes I visited your land but I did not see any beacons. I did not respect your land because there was*

nothing to identify your land. At the time I went there I saw no beacon. I did not measure all your land".

From the evidence both surveyors went with the parties of the respective lands on various occasions but they did not do anything together to identify their various lands which would have led to clearly showing whether or not there was an encroachment.

The Court visited the locus in quo which should have proved helpful in identifying the lands of the various parties. Unfortunately the Registrar who took down notes at the locus could not produce them as she claimed she could not trace them because of the fire disaster at the Law Court Building. The Plaintiff in person at the time and Betts Esq. Counsel for the Respondent agreed that since this was a civil matter the Court should ignore the proceedings at the locus and proceed to receive addresses.

Unfortunately as stated earlier in the judgment the locus in quo was not helpful in identifying the land.

In a claim for a declaration of title, it is of vital significance that there is certainty of the land in question. The onus, and it is a heavy one, of establishing the identity of the suit land is on the person making the claim. There are various ways of doing this. It can be done by a clear description of the land, including salient features of the land, so that any surveyor acting on the description should be a able to produce an acceptable plan of the suit land See **KWADZO V. ADJEI (1944) 10 WACA** 274. Where the parties in dispute know and are at ad idem as regards the identity of the land in dispute, there is certainty as to the suit land and no surveyor's plan is necessary. **See Ojibah V. Ojihah (1991) 5 NWLR p. 296 at p. 311.** However, perhaps

a preferable and better way of proving the identity is by filing a surveyor's plan of the area being claimed. The production of a surveyor's plan of the area depicting the salient features and boundaries of the land being claimed and its relative position to the surrounding land and adjacent properties is necessary where the identity of the land in dispute is being challenged or is in doubt.

In the instant case, Mr. Fredrick Max Carew (The Appellant herein and the Plaintiff at the trial court) relied on his licensed surveyor, Mr. Benoni A.O. Thomas (P.W. 2), who gave evidence and produced two survey plans namely, exhibit "G", which he claimed shows that the land upon which Dr. P.K. Lavahun (the Respondent herein and Defendant at the trial Court) built forms part of the land of Mr. F.M. Carew. But in another surveyor's plan (Exhibit "H") prepared and produced by Mr. Benoni A.O. Thomas indicates that the land upon which Dr. P.K. Lavahun built is 125 feet from the land of Mr. F.M. Carew. Mr. Francis Davidson During, the licensed surveyor called on behalf of Dr. P.K. Lavahun, prepared and produced a survey plan (Exhibit "M") showing the relative positions of the land upon which Dr. P.K. Lavahun built and that of Mr. F.M. Carew, and asserted they are far apart. The evidence of Mr. Benoni A.O. Thomas the surveyor, is contradictory and confused. In the given evidence can it be said that Mr. F.M. Carew, as Plaintiff, had discharged the heavy burden of establishing with any measure of certainty the land he is claiming? The trial court gave the answer in the negative; the Court of Appeal concurred; and so does this Court. Once the identity of the land being claimed by the Plaintiff is in doubt the claims for a declaration of title and trespass to the land in question must necessarily fail since in real terms there is nothing on which the claims are based.

Having read the whole evidence of the witnesses and taking into account the Exhibits tendered, I am not convinced that the identity of the lands of both the Appellant and the Respondent have been properly identified.

In the circumstances I non suit the Appellant and order a retrial. I also order that the judgment of the Court of Appeal and the High Court be set aside. Each party to bear his own costs.

HON. MRS. JUSTICE V.A. D. WRIGHT JSC

HON. MRS. JUSTICE S. BASH-TAQI JSC - I AGREE

HON. MS. JUSTICE SALIMATU KOROMA JSC - I AGREE

HON. MR. JUSTICE M.E. TOLA THOMPSON JSC - I AGREE

HON. MR. JUSTICE G. SEMEGA-JANNEH JSC - I AGREE

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Registrar
Supreme Court