IN THE SUPREME COURT OF SIERRA LEONE

C.O.E. COLE, Chief Justice (Presiding)
S.C.M. BETTS, Justice of the Supreme Court
E. LIVESEY LUKE, Justice of the Supreme Court
A.V. AMUNOR-RENNER, Justice of Appeal
S.C.E. WARNE, Justice of Appeal

Civil Appeal No.1/75

DUNSTANT E. JOHN & REUBEN L. MACAULEY
- Plaintiffs/Appellants

And

WILLIAM STAFFORD, ALFRED GEORGE
NATHANIEL COLE & JOHN EDDIE TAYLOR
- Defendants/Respondents

J U D G M E N T 13TH JULY, 1976

J.H. Smythe, Esq., Q.C., with him
Mrs. H. Ahmed for the appellants

A.J. Bishop-Gooding, Esq., with him
G.J. Betts, Esq., for the respondents

BETTS, J.S.C.:- On the 21st January, 1975, the Court of Appeal delivered judgment dismissing an appeal from the High Court, judgment of which Court was dated the 6th December, 1973. The pith of that judgment was that the case of the plaintiffs/appellants was based on such unreliable foundation that it would be unsafe to make the declaration and orders sought. The Court of Appeal in affirming that judgment said inter alia :-

> "The various authorities cited before him" (the learned trial Judge) "were reviewed by him and he came to the right decision in dismissing the action as the burden

of proof cast on the plaintiffs/ appellants was never discharged by them."

It is against the judgment that the following grounds of appeal were lodged.

(i) The Court of Appeal is wrong in law in upholding the judgment of the High Court with reference to that Court's rejection of the evidence of the 4th Defence Witness Mr. McEwen who had tendered Ex. W because it was prepared while the case was in progress.

(ii) That the Court of Appeal as was constituted was ultra vires the Constitution in that one of the Judges the Honourable Justice Ken. O. During, J.A. who heard the appeal had given a ruling in the matter in the High Court.

(iii) That the Court of Appeal was wrong in law in upholding the judgment of the High Court with reference to the ruling of Honourable Ken. During dated 27th April, 1972, refusing an application to strike out the defence of the 1st and 3rd defendants on the grounds that they violated the rules, principles and practice of pleading.

(iv) That having regard to the evidence and the law applicable the judgment is unsatisfactory.

(v) The Court of Appeal was wrong in law and acted contrary to all known principles of law and practice in merely accepting the findings of the trial Judge without even attempting to review the law and the facts.

For the purposes of this appeal counsel for the plaintiffs/appellants notified the Court that he was not arguing grounds 2 and 3. The grounds on which he was basing his arguments were 1, 4 and 5. These he proposed to deal with under five heads. Before arguments started however counsel for the defendants/respondents applied for an amendment to his case. Let me dispose of it at this point.

He drew the attention of the Court to the fact that consistently counsel for the plaintiffs at plaintiffs/appellants in the High Court and in the Court of Appeal endeavoured to obtain the rejection by the Courts of Ex. W and that in the Supreme Court counsel for the same parties has adopted a completel different line of approach by inviting the Court to consider Ex.W - a plan of the entire area including the portion allegedly trespassed. He argued, that if this approach is conceded then this Court might be called upon to assess and evaluate fresh matters. To support his argument he cited the case of EXPARTE [illegible] (1877) 5 Ch. D.382; and NORTH STAFFORDSHIRE vs [illegible] (1920) A.C. 254 at P.263. In the "[illegible]" case, the situation was equivocal and at the hearing it was the fraudulent conduct of the plaintiff that was more strongly urged than that of the defendant. This was not a defence in the opinion of the Chief Judge but a new case being set up. It was a question of who had behaved fraudulently and to whom. Even if it is conceded that Ex. W - an exhibit could have some bearing on the case - it was not of such a nature as to affect its basic character. In that case "[illegible]" and the subject matter cannot be compared. In the case of NORTH STAFFORDSHIRE already cited I would quote a portion of Lord Birkenhead's judgment and then make a further distinction between what can be gathered from it and the submission of counsel:-

> "The appellate system in this country is conducted in relation to certain well known principles and familiar methods. The issues of facts and law are orally presented by counsel. In the course of his argument it is the invariable practice of appellate

> tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and authority of the Court of Appeal and, especially of the final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below."

From observations on the conduct of this case the counsel in the Courts below have made repeated submissions which drew the attention of the learned trial Judge to Ex. W, even if it was only to reject it. The crucial point here however is that the rejection or admission of Ex. W as part of the evidence was unavoidably cast on the trial Judge. The distinction, to my mind, is that whatever decision on the point is arrived at by the trial Judge, that decision would be of a voluntary nature on the one hand and an involuntary one on the other. It was, at the worst, rather an obvious attempt by counsel to be unduly persuasive, and it cannot be said that a new matter was being advocated. With respect, I do not think the learned trial Judge was justified in excluding Ex. W from consideration before he had decided whether the plaintiffs/appellants were entitled to a declaration. The plaintiffs/appellants attached great prominence to the fact that the learned trial Judge withdrew Ex. W from his consideration. He argued that failure to consider the plan had adversely affected the learned trial Judge's view as otherwise his clients would have been adjudged entitled, to at least, 1.7 acres of land accepted

therein to have been trespassed upon. Counsel argued that the reason that the plan was prepared during the progress of the trial advanced by the Judge was untenable as the case on which he relied did not contemplate that specific contingency. JACKER v THE IINTERNATIONAL CABLE COMPANY LTD. (1888-89) Vol. V LTR 13 carries a head-note, Appeals - Evidence improperly received in Court below - Duty of the Court of Appeal. This obviously was guidance for the Court of Appeal and not the Court of first instance but the case of BOWKER v. WILLIAMSON (1888-1889) Vol.V L.T.R. 383, showed that the Court of first instance could reject from consideration, in certain circumstances as where there was a deliberate attempt to conceal the real terms of an agreement, evidence it had already received. No parallel was suggested in Bowker's to fit the case here. Counsel for the plaintiffs/ appellants realising that the failure of the trial Judge to ascribe an acceptable reason for the rejection of evidence does not automatically entitle Ex. V to consideration, even if admissible, referred to S.3(3) of the Evidence (Documentary) Act, Cap.26. 1926. The text is "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." After a document has been admitted S.4(1) of the same Act dictates how that statement is to be evaluated as to weight.

I have already referred to the fact that Ex. V was excluded from consideration by the learned trial Judge.

This, in my opinion and with respect, was without a satisfactory foundation in law. In determining whether D.W.4 was a person interested and whether Ex. W which he prepared could be admitted in the first place, and when admitted, secondly, ought to be considered, certain guide lines are necessary. When a person is interested his statement or document would be inadmissible under S.3(3) of the Evidence (Documentary) Act, Cap. 26, 1926 in Sierra Leone while in England the same effect would be produced by virtue of S.1(3) of their Evidence Act, 1938 and where the expression has come up for interpretation in a long and impressive line of cases. But let us begin with 'person'. It means 'any person whatsoever' as in BARKWAZ v SOUTH WALES TRANSPORT CO. (1949) 1 K.B. 54; and 'person interested' means a person interested in the result of the proceedings, pending or anticipated; thus a servant of a company is interested in the proceedings of the company where it is to his advantage for the company to succeed (PLOMIEN FUEL ECONOMISER COMPANY v NATIONAL MARKETING BOARD (1941) Ch. 248. So also a domestic servant where her reputation for care as a child-minder was in issue EVON AND EVON v NOBLE (1940) 1 K.B. 222 or (1948) 2 All E.R. 987. As the character and subject matter of the proceedings and the relation thereto of such person must be considered all servants are not necessarily persons interested as in the case of IN RE HILL, BRAHAM v HASLEWOOD (1948) 2 All E.R. 490, in which a solicitor's clerk was declared a person not interested. In two cases the word 'interest' was dealt with. FRIEND v. WALLMAN (1946) All E.R. 634, Somervell, L.J. said -

"Interest clearly means personally interested in the result of the proceedings."

and Delvin L.J. in BEARMANS LTD. V METROPOLITAN POLICE DISTRICT [illegible] (1961) 1 [illegible] 634, said -

"The word 'interest' is not a word which has any well defined meaning, and anybody who was asked what it meant would at once want to know its context in which it was used before he could venture an opinion. It may mean a direct financial interest on the one hand or on the other hand it may mean nothing more than the ordinary interest which everybody has in the outcome of proceedings in which he is likely to be a witness."

In order to arrive at a decision whether D.W. 4 Mr. McEwen was an interested person I would have to ask myself whether he could conceivably have any personal interest in the outcome of the proceedings, whether D.W. 4's professional or financial interests were in issue, whether his conduct had been dictated by himself or whether he was under the control of some other person and whether he had the skill to execute the work for which he was engaged and what was his relationship with his employer. These questions embrace in my opinion a reasonable examination of the circumstances; the contents of the document concerned; the factors which would establish the purpose why the document was made, and clearly, if the maker had a personal interest in the result of the proceedings. Applying these tests I can safely say I am satisfied that D.W.4 Mr. McEwen is not a person interested under the Act and Ex.W has properly been admitted and ought to have been considered if the circumstances so required.

Counsel for the plaintiffs/appellants treated the

statement of defence as an admission of trespass to the extent of 1.7 acres of land. He grounded his right to a judgment to that extent on the evidence of D.W.4; Ex. ; and the statement of defence. Counsel for the defendants/respondents strongly protested that he made any such admission and that his use of the word 'overlap' should not and does not convey any such intention. In the case of CHRISTIAN YAO KUSIEDU & OTHERS v DUODUAH DOMPREY & OTHERS 2 W.A.C.A. 273 involving trespass to land in the Gold Coast (then) the word 'overlap' was used in the course of the judgment. It reads -

> "There are many points which bear out this view that the area of Kisiedu's grant did not 'overlap' the area claimed by the appellants. The most striking is that Kisiedu's settlement and cultivation were entirely north of the road. This it should be noted was a case of trespass to land. The respective claims were shown on a plan Ex.A in the case, Kisiedu's claim being edged green and Dompreh's yellow. The trial Judge decided in favour of Kisiedu's side and gave him £100 damages with costs to him and his associates, and granted an injunction against Dompreh and his associates, their agents or servants trespassing on the land."

I do not see how I can come to any other conclusion than that the word 'overlap' used in this way in connection with land is equivalent to the use of the word trespass. I must make it clear that I do not mean that trespass has been proved, what I have considered here is terminology instead of proof.

The core of the judgment of the Court below is contained in the words -

> "I find the plaintiffs case to be based on such unreliable foundation that it would be unsafe to make the declaration and orders sought."

Before embarking on a detailed examination it is worthwhile to observe that there has been a considerable shifting of ground with regard to the acreage in this matter. The statement of claim, paragraph 2 states -

> "The said Sarah Macauley (hereinafter called the testatrix) was at the time of her death seised in possession of and otherwise well entitled to ALL THAT piece of land situate lying and being at Barbardori, in Bamley Village aforesaid, commonly known as Barbardori Grass Fields, containing an area of 38 acres."

In her own Statutory Declaration she described her entitlement as "38 acres more or less". In the petition of appeal before this Court at paragraph 4, counsel pleaded -

> "That the case involves title to 26 acres of land at Bamley Village value about Le.52,000."

But in paragraph 4 in his case for the Appellants, Counsel sets down "The evidence of the ownership of the disputed land was given by P.W.1, P.W.2, P.W.3, P.W.4. D.W.5 a licenced surveyor gave evidence as to the encroachment or overlapping of the land of the plaintiff and gave the extent of the encroachment as 6.371 acres. In Court counsel was saying that he could at least have had judgment for 1.7 acres which he seemed willing to accept. That immediately revealed the indecisiveness of the claim as regarding declaration of title. The plaintiffs/appellants therefore were faced with the difficulty of proving title to the whole 38 acres of land or of establishing possessory title thereto. If either of these was achieved then proof of title to 26 acres of land would be unnecessary as would be proof of the 6.371

acres. In that case if ownership of 38 acres is established in favour of the plaintiffs/appellants, then it would follow that they were entitled to a declaration for the 1.7 acres.

In order to resolve the uncertainties which beset the learned trial Judge he followed the principle outlined in the case [illegible] v ODU 2 [illegible] 336 which states that "the onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought before him to a declaration of title" and also the well-known case of [illegible] v [illegible], 14 [illegible], 902, which says "the burden is on the plaintiff to prove his right to a title and other relief by independent means". After giving due consideration to the law and facts before him the learned trial Judge found he could not make the declaration. In the case of WALTER RIDDLE V SAMUEL NICOL (1971) Court of Appeal (S.L.) - unreported, in which the case of [illegible] and [illegible], an appeal from the Provincial Commissioner's Court, cited in [illegible] Vol. [illegible] 274, it was held that before a declaration of title is given the land to which it relates must be ascertained with certainty, the test being whether a surveyor can from the record produce an accurate plan of such land. There is also the case of [illegible] v [illegible] (1957-1960) [illegible], S.L. 128 ([illegible] Clarke, J.), this quotation follows -

> "In [illegible] v ADJEI, already cited, the East African Court of Appeal laid down the test to be applied as regards the delimitations of land in dispute." Though this is an action for declaration of title the principles laid down by the Court as to the necessity for defining with certainty the area in dispute would, in my opinion, apply to an

> action for ejectment. The Court of Appeal, among other things said: "The acid test is whether a surveyor, taking the record could produce a plan showing accurately the land to which title has been given."

I would also refer to the oft-repeated legal principle that the plaintiff must depend on the strength of his case not the weakness of the defendants contained in the case of [illegible] & [illegible] v [illegible] (1968-69) A.L.R. S.L. [illegible] and in [illegible] v [illegible] (1968-69) A.L.R. S.L. [illegible]26.

Applying these principles to this case it seems to me that the Judge was justified in coming to the conclusion he did regarding the declaration of title. I have to make a comment at this point to what might otherwise be considered to amount to a conflict. In an earlier portion of this judgment I came to a conclusion that I did not think the learned trial Judge was justified in excluding Ex. [illegible] from consideration. I must not be taken to mean that the trial Judge was obliged under any circumstances to consider Ex. [illegible] but that the exhibit was entitled to consideration if and when the necessity arose. This is completely different from a total denial of consideration, which appeared to have been the case. Although the claim among other things was for trespass as well as a declaration, the trial Judge and the Court of Appeal dealt exclusively with a declaration. The declaration sought was for title to [illegible] acres of land. As a legal concept a claim for declaratory title demands a much higher degree of proof than that required for a claim for trespass; and though usually they are claimed together they can be considered as separate and distinct issues.

2 W.A.C.A. (1934-35) p. 339, Carey, J., gave a declaration in favour of the plaintiffs in respect of a piece of land at Ikot Esion of the value of £50. The plaintiffs had also claimed damages for trespass by collecting palm nuts etc., on the said land, but the trial Judge awarded no damages, the alleged trespass being in his opinion trifling and he stated that this part of the claim was not persisted in. It could be inferred that Carey, J. adverted his mind to the question of trespass quite separate and apart from the question of declaration. The core of this aspect of the complaint is that the learned trial Judge never treated the trespass to 6.371 acres as a separate issue.

In a claim for trespass the plaintiff need not prove title as stated in the case of GOSLYN v WILLIAMS (1720) Fortes.Rep. 378. Possession alone is indeed sufficient to sue in trespass as against a wrong-doer, but it must be clear and exclusive possession, (stress mine) as Best, C.J. said in REVETT v BROWN 5 Bing.7. In the case of CHIEF KOJO BOSOR v CHIEF KEBBIE there was a claim for £100 for trespass on the plaintiffs's land. The learned trial Judge found as a fact that the plaintiff had failed to prove possession of the land upon which the alleged trespass took place. The submissionsand arguments made before this Court would, if either title or possession to the whole area or to the 6.371 acres had been established have been sufficient. In the case of McDOUGAL v McDOUGAL (1915) 49 N.S.R. 101, the facts were that plaintiff in trespass claimed under deed which gave him colour of title and in addition established a long series of acts of possession on the part of his father

and himself, including working the property, and the use of the locus, the beach in front of the property, as a place for shipment of timber and produce and as a boat landing, and the taking from it of dulverse sand, gravel, or other material of that nature they required. Held, the occupation shown, coupled with the deed giving colour of title, constituted a title in the plaintiff which will enable him to maintain trespass against the defendant. Here again it comes out that the possession, in spite of the documentary assistance, must be clear and exclusive. Here, there was documentary help bu the possession was neither clear nor exclusive.

The Court of Appeal's judgment was rather short and curt. That Court, from the arguments, concluded that there was no substance in any of the grounds of appeal. The Court went on to give a reason and this was -

> "The various authorities cited before him were received by him and he came to the right decision in dismissing the action as the burden of proof cast on the plaintiffs was never discharged by them."

There, rightly or wrongly, the Court had arrived at the decision that the whole appeal was without merit as lacking in substance, an indication of the principal reasons ought to have been given. All it might have done was to have given this Court an opportunity of acquainting itself with their opinion (as per Lord Birkenhead). Perhaps a cautious advice to the Court of Appeal would be in place.

However in view of what I have already said I would affirm the judgment of the Court of Appeal with regard

t, the claim for a declaration; and allow it as [illegible] for the [illegible] and remit to the High Court for re-hearing.

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S.J. [illegible] Watts - J.S.C.

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[illegible] Livesey Luke - J.S.C.

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A.F. A[illegible]- [illegible] - J.A.

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COLE, C.J:- I have had the privilege of reading the erudite judgment of the Honourable Mr. Justice S.C Betts in this case. With his final conclusion I very much agree. This case must go back to the High Court for a re-hearing.

Let me make, for the guidance of the Court below, two points quite clear.

The first is this. The legal authorities, which have been referred to, show quite clearly that applying them to the evidence led before the High Court, the learned trial Judge as well as the Court of Appeal was justified in dismissing the claim for declaration of title. That part of the appeal therefore fails.

The second point is this. I am clear in my mind that the claim for trespass was not considered either by the learned trial Judge or the Court of Appeal. Even if this was done neither court applied for the correct principles of law set out in the established authorities on this point so ably discussed in the judgment of my learned Brother Justice S.C.U. Betts. It is in these circumstances that I would allow the appeal as regards the claim for trespass and would remit the case to the High Court for re-hearing as regards trespass and damages for trespass.

C. O. E. Cole

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C.O.E. Cole - Chief Justice

WARNER, J.A.:- I have had the opportunity and privilege of reading the painstaking judgment of my learned brother, Betts, JSC. I entirely agree with his conclusion.

The legal authorities are very revealing. I hope they will serve as a reminder that there is a clear distinction between title per se and possession. The authorities show that even though a claim for a declaration for title fails, if a claim for trespass is sought, the courts should consider the evidence, to see if possession has been proved to found a claim for trespass.

I agree that the case be remitted to the High Court for re-hearing regarding the claim for trespass

S.C.E. Warner, J.A.

I have had the advantage of reading in draft the judgment of my learned brother Betts J.S.C. I agree with his conclusion. I too would allow the appeal and remit the case to the High Court for a re-trial on the issue of trespass.

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D. LIVESEY LUKE - J.S.C.