

C.C 641/03 2003 S. NO. 74

IN THE HIGH COURT OF SIERRA LEONE
(LAND AND PROPERTY DIVISION)

BETWEEN: -

JONATHAN THOMAS - PLAINTIFF

AND
GIBRIL MANSARAY - DEFENDANT

A. Y. Brewah Esq. for the Plaintiff
O. Jalloh Esq. for the Defendant

JUDGMENT DELIVERED THE 21st DAY OF October 2011

The Plaintiff's claim herein against the Defendant is for the following reliefs:

1. Damages for trespass on the Plaintiff's land.
2. A perpetual injunction restraining the Defendant by himself, servants, agents and privies or howsoever from trespassing on the Plaintiff's land.
3. Any further orders
4. Costs.

The writ of summons issued against the Defendant is dated 26th June 2003 and in the particulars of claim the Plaintiff pleaded that he is the owner and the person entitled to possession of all that piece or parcel of land situate lying and being at 68 Mayenkinch Road, off Main Road Calaba Town measuring 0.171 acre as delineated on the

survey plan LS 560/94 attached to his Deed of Conveyance made between **ABDULAI FOFANAH SHERIFF** and himself dated 20th July 1995. He further averred that the Defendant by himself, his servants, agents and privies trespassed on his land and unless restrained by the court intends to continue his act of trespass and to remain unlawfully on his land. He went on to plead that by his wrongful conduct the Defendant has deprived him of the use and enjoyment of the said piece of land and he has thereby suffered considerable financial loss and damage.

The Defendant initially did not enter appearance and judgment in default was entered against him which judgment was later set aside and he was given leave to defend the action. In the meantime the Plaintiff had obtained an order of court to demolish the Defendant's concrete wall fence allegedly built on the Plaintiff's land.

The Defendant entered appearance on 24th June 2008 and a defence and counterclaim was filed on his behalf and the defence was later amended by leave of the court.

The defence firstly averred that the Plaintiff's claim was statute barred by virtue of s.5(3), s.6(i) and s. 11 respectively of the Limitation Act 1961 since the alleged cause arose more than 12 years before the commencement of the action.

Alternatively the Defendant alleged that it was the Plaintiff who had trespassed on his land despite repeated calls by the Defendant for the Plaintiff to desist from his said trespass. He further alleged that as a result of the Plaintiff's wrongful conduct he has suffered tremendous loss and damage. The Defendant counterclaimed for a declaration that he is the fee simple owner and the person entitled to possession of all that piece of land situate lying and being off Main Motor Road, Calaba Town measuring 0.1643 acre as delineated on survey plan LS 1608/81 attached to his Deed of Conveyance dated 1st December 1981 and registered in Volume 335 at page 10 of the books of Conveyances kept in the office of the Registrar General Freetown. He also prayed for an injunction restraining the Plaintiff whether by himself, his servants, agents, privies or howsoever otherwise from entering, remaining, selling or in any other manner interfering with the Defendant's use and enjoyment of the said land.

The Plaintiff filed a Reply and Defence to the counterclaim in which he denied that he trespassed on the Defendant's land. He did not file an amended reply and defence to the counterclaim after the Defendant had amended his Defence and Counterclaim.

Directions for the conduct of the trial were issued by the court and the parties filed their court bundles in compliance thereto.

At the trial the Plaintiff testified on his own behalf and tendered his witness statement as Exh "L" which was used as his evidence-in-chief. He testified that after having purchased his said land situate off Main Motor Road Calaba Town and known as 68B, Mayenkinah Road in July 1995, he observed sometime in April 1996 when he was about to take actual possession of the said land that the Defendant had encroached on the same and erected a toilet thereon. He stated that he consulted his solicitor who wrote a letter dated 12th April 1996 to the Defendant in respect of the said encroachment. The letter was tendered as Exh "A". The Defendant failed to heed the said letter and the Plaintiff stated he proceeded to erect a wall fence and so he made a report at the Kissy Police Station as a result of which an independent surveyor was employed by both parties to ascertain the encroachment on the pieces of land. The surveyor's report was tendered as Exh "B", but at the date of the trial the surveyor had fallen ill and was incapable of testifying before the court and his report was later expunged from the records and replaced by another report dated 6th July 2009. The officer in charge of Kissy Police Station forwarded the Conveyances of both parties to the Director of Survey's and Lands with a request to ascertain which party was trespassing on the other's property. The response dated 5th August 2001 was exhibited as Exh "D".

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The Plaintiff alleged that the Defendant still continued his act of trespass and he instituted the present action against the Defendant seeking the reliefs earlier mentioned.

The Plaintiff was cross-examined on his testimony and he told the court that prior to his acquisition of the land described in his Deed of Conveyance, the Defendant had constructed a kitchen and toilet on the land. He admitted that he did not build his own kitchen opposite that of the Defendants but that his kitchen is some distance away from that of the Defendant. He stated that the Defendant's wall fence was demolished as a result of the court action he instituted against the Defendant. He denied that he had trespassed on the Defendant's land.

The next witness for the Plaintiff was his surveyor, **MR. ALIYA JOSEPH SONDIMA**. He tendered his report and composite plan – Exh “B1-2” which he had prepared on the Plaintiff's instruction using the conveyances and survey plans of both the Plaintiff and the Defendant.

Under cross-examination, the surveyor stated that the total area of the Plaintiff's land is 75 feet by 100 feet and that the Defendant had built the kitchen and store and wall fence mentioned in his report before the Plaintiff acquired his land. He stated that the report and composite plan submitted by the Defendant's surveyor did not correctly reflect the situation on the ground and that according to his findings it was the Defendant who had trespassed on the Plaintiff's land.

He told the court that the Plaintiff's survey plan LS 560/94 is the same as LS 2666/92 his predecessor in title's survey plan and only reflected a change of name. He stated that on his visit to the site he observed that the Plaintiff had erected a fence and had constructed a toilet back to back the Defendant's kitchen and toilet and the wall was constructed between the toilet and kitchen in each compound

That ended the case for the Plaintiff.

The Defendant did not appear at the hearing. The first witness was **DAN DANIEL** a business man who tendered his witness statement, Exh "L" which was used as his evidence in chief. He stated that he knows the land the subject matter of the action and that it was bought by his mother, **MRS. MARIE DANIEL** on behalf of the Defendant who is resident in the U.S.A. He stated negotiation for the purchase of the land started between his mother and the vendor **MR. KEKURA ALHAJI DEEN SWARRAY** in 1979 and that he had accompanied his mother when the land was surveyed and it was the said vendor **MR. KEKURA SWARRAY** who showed them the land. He further stated that construction of a dwelling house on the land was commenced by the Defendant in 1982 and he and other members of his family moved into the house prior to its completion in 1984 and this was before the Plaintiff purchased the piece of land next to that owned by the Defendant. The house was completed in 2000 and the Defendant with the help of the witness's mother constructed a wall fence and store on the said land.

After the Plaintiff purchased the land next to the Defendants from the same vendor in 1984 he used to store his building materials in the Defendants house and he stated that they lived peacefully on the land without any confrontation from the Plaintiff until December 2006 when bailiffs and the police came to their house and informed them that judgment had been obtained against the Defendant in a matter brought against him by the Plaintiff and they proceeded to demolish the Defendants wall fence, kitchen, toilet and store, causing them considerable hardship.

The witness was cross-examined on his testimony.

The next witness for the Defendant was **MRS. MARIE DANIEL DW2** who also tendered her witness statement as Exh "M" and her testimony was along similar lines of **DW1, MR. DAN DANIEL**, her son. Under cross-examination she told the court that the Plaintiff was not already on the land when she constructed the wall fence.

The third witness for the Defendant was the Surveyor **MR. ALEXANDER COKER DW3**. He stated that he was instructed to investigate the dispute between the Plaintiff and the Defendant pertaining to their lands. He said he looked into the matter and prepared a report and composite plan which were tendered in evidence as Exh "H1-2".

His conclusion was that there was an encroachment of 25 feet x 26 feet x 7 feet into the Defendants land by the Plaintiff. He also observed that of the Defendants wall fence measuring 123.5 feet x 75 feet had been demolished.

The witness was cross-examined on his evidence. The Defendant then applied for leave to amend his defence and counterclaim which was granted and leave was also granted the Plaintiff to amend his reply and defence to the counterclaim. In the end the Plaintiff declined to make any amendment to his reply and defence to the counterclaim. The Defendant then closed his case. Both counsel submitted written closing addresses.

The Defendant has raised in his defence to the action a claim that the Plaintiff's claim is statute barred. Counsel for the Defendant referred the court to the date of the writ summons which is 23rd June 2003 which reveals the date of the commencement of the action. He also referred to the date of the Defendant's conveyance which is 1st December 1981 and he submitted that the evidence before the court establish that the Defendant had long since been in possession of the land and had built the wall fence and other structures thereon before the Plaintiff acquired his piece of land next to that of the Defendant. He submitted that the Defendant having been in possession of the land for a period in excess of 21 years, the Plaintiff cannot maintain an action against him for damages, trespass and recovery of possession of the said piece of land.

Counsel relied on s. 3 (i) (a) of the Limitation Act 1961 which provides that an action founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. He submitted that the action for damages for trespass is an action founded on the law of tort but the Plaintiff having failed to institute these proceedings for trespass within the statutory limit of six years, his claim is therefore statute barred.

Counsel for the Plaintiff in response to this claim submitted that since the evidence does not disclose when the Defendant built the structures on the land, the claim by the Defendant that the action is statute barred should be dispensed with. He maintained that notwithstanding the Defendant's conveyance predated the Plaintiff's conveyance the evidence shows that the Defendant committed acts of trespass by constructing his kitchen and toilet on the Plaintiff's land and the Plaintiff had started objecting and complaining well within time.

It is necessary to establish when the cause of action accrued to the Plaintiff. The Plaintiff's evidence is that he bought the piece of land in July 1995 several years after the Defendant had purchased his but that when he wanted to take possession of it he observed that the Defendant had encroached on the said land and erected a toilet thereon. He stated that he immediately contacted his lawyer who wrote to the Defendant in respect of the encroachment – Exh "A".

Thereafter when the Defendant did not heed the letter, the Plaintiff made a report at the Kissy Police Station and the services of an independent surveyor were hired to ascertain whether or not there was an encroachment. A report dated 22nd December, 2001 was prepared on his findings – Exh “B”. The officer in charge, Kissy Police Station then wrote to the Director of Surveys and Lands forwarding the parties conveyances with a request to ascertain the position regarding the dispute. The Director of Surveys responded by memorandum dated 5th August 2002 stating that the Defendant’s concrete wall exceeds his boundary as shown on his survey plan. The Plaintiff stated that notwithstanding these reports the Defendant continued his alleged acts of trespass and he therefore instructed his solicitor to institute action against the Defendant and that on 26th June 2003 the writ of summons was issued. It is therefore my belief that it was after the letter of 5th August 2002 the memorandum of the Director of Surveys and Lands and the Defendants alleged continued acts of trespass that the Plaintiff’s cause of action accrued. It seems to me that it is after the Director of Surveys had informed the Plaintiff of his findings relating to the complaint that the Plaintiff could rightly bring an action against the Defendant for trespass. The Plaintiff’s cause of action therefore accrued on 5th August 2002. The Plaintiff having instituted the action in June 2003 is within the statutory limit and the action is therefore not statute-barred.

The issue now to be determined is whether the Plaintiff has established his claim that the Defendant has trespassed on his land. Counsel for the Defendant has submitted that the evidence shows that it is the Plaintiff who has trespassed on the Defendant's land and wrongfully procured the demolition of the Defendant's toilet, kitchen and wall fence.

The Plaintiff relied on his evidence given at the trial and on the letter from the Director of Surveys dated 5th August 2002, Exh "D" and also on his surveyor's report and composite plan, Exh "B1-2". Counsel for the Plaintiff submitted that these pieces of evidence disclose the correct position of the land on the ground. He went on to submit that the testimony of the Plaintiff's surveyor, PW2 showed firstly, that the Defendant had built his structures on the disputed land and secondly, that there has been no proof as to when the Defendant built these structures on same. However this submission cannot be correct because from the evidence of DW1 and DW2 they disclosed that the wall fence and other structures were built in 1984. There is also the evidence of **MRS. MARIE DANIEL DW2** that she allowed the Plaintiff to use the store to keep his building materials until he completed his house. This piece of evidence has not been controverted. In fact it was confirmed by the Plaintiff himself when he said that prior to his acquisition of his land the Defendant had constructed a kitchen and toilet on the land.

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It is therefore necessary at this stage to look at the reports of the surveys carried out by the parties surveyors. Exhibits "B1-2" are the report and composite plan done by the Plaintiff's surveyor. The surveyor, PW2 observed that the Defendant "moved from his correct location according to details on his document to occupy the position shown on the composite plan and on the map sheet for the area". He concluded that the property of the Plaintiff as described on his survey plan LS 560/94 is in its right position and that it was the Defendant who encroached on the Plaintiff's land.

Let us now examine what the Defendant's surveyor had to say in his report. He stated inter alia as follows

"The cadastral location of LS 1608/81 property plan of **MR. GIBRIL MANSARAY** precisely conforms with its physical location. Physically on the ground **MR. GIBRIL MANSARAY's** property has a dimension of 75.0 feet by 123.5 feet instead of 75.0 feet by 100.0 feet as was shown on his property plan. What caused the additional 23.5 feet, I don't know, but **MR. GIBRIL MANSARAY** told me that was the position where his surveyor fixed his beacons and as a result he constructed a toilet and kitchen on his boundary in 1984 and built a wall fence along the perimeter of 75.0 feet by 123.5 feet with no objection from the vendor..."

From the above evidence it is clear that the Defendant fixed his beacon in 1981 some 23.5 feet from where it was supposed to be.

It is my view that this is where the problem emanated. Indeed when the Plaintiff purchased his land in 1995 he observed that there was an encroachment on his land by the Defendant where he had constructed his toilet. His evidence is that he contacted his solicitor who addressed a letter to the Defendant – Exh “A”. This was followed by his report at the Kissy Police Station resulting in an independent survey being carried out and culminating in the memorandum from the Director of Surveys Exh “D” dated 5th August 2002 in which he stated that **MR. GIBRIL MANSARAY**’s wall fence as constructed exceeds his boundary limit as shown on his survey plan. Even the Defendant’s surveyor concluded that plotting LS 1908/81 property plan of the Defendant against LS 560/94 property plan of the Plaintiff there is a slight triangular overlapping of 25.0 feet x 26.0 feet x 7 feet. He maintained that there was no objection from the vendor when the Defendant ran his wall fence, but that in my view does not justify the encroachment.

It is my view that there is sufficient evidence to establish that it is the Defendant who trespassed on the Plaintiff’s land. There is evidence that the Defendant’s wall and other structures have been demolished pursuant to a court’s order. There is further evidence that the Plaintiff has built another wall fence in the correct position. In the case **Jaber vs. Rader** (No.2) 1950-56 ALRSL 197 relied upon by counsel for the Defendant it was held that in an action for trespass the Plaintiff, if he proves the trespass is entitled to recover damages even though he has not suffered any actual loss.

The Plaintiff in this case in my view recovered the piece of land he claimed the Defendant trespassed on. He is entitled to recover some damages for the Defendant's trespass thereon. In this case where the Plaintiff in an earlier action obtained a court order and in fact executed the said order and had the structures erected by the Defendant on his land demolished, I believe he is entitled to only nominal damages. The Defendant's counterclaim therefore fails. Judgment is hereby given in favour of the Plaintiff and I make the following Orders

1. Damages are awarded the Plaintiff in the sum of Le 2 million to be paid by the Defendant.
2. A perpetual injunction restraining the Defendant whether by himself, servants, agents and privies or howsoever otherwise from trespassing on the Plaintiff's land.
3. Costs of the action to the Plaintiff to be taxed if not agreed upon.

A. Showers

SIGNED: - A. SHOWERS 21/10/2011
JUSTICE OF COURT OF APPEAL