TAMBA v KAI

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Civil Appeal 3 of 1984, Hon Mr Justice SMF Kutubu CJ, Hon Mr Justice CA Harding JSC, Hon Mrs Justice AVA Awunor-Renner JSC, Hon Mr Justice S Beccles Davies JSC, Hon Mr Justice SCE Warne JSC, 18 February 1992

[1] Land – Trespass – Possession – Question of fact – Standard of proof – Valid conveyance of land was sufficient to prove possession

[2] Courts – Court of Appeal – Basis upon which findings of fact by trial judge can be overturned – Conveyance of land – No basis to overturn trial judge's decision

The appellant (plaintiff), James Tamba, was authorized to sell a parcel of land in Main Road, Wellington by Momoh Kamara (deceased). Tamba divided the land into three plots and sold one to Macauley in 1971 and one to the respondent (defendant), Momoh Kai, in 1974. In 1975 Macauley sold his land to Kai and a dispute arose as to whether this was the same plot of land that he had purchased from Tamba (as agent for Kamara) in 1974. Kai reported the matter to the CID and asked for his money back. Tamba repaid the money and the plot was reconveyed back to him in September 1976. Subsequently Tamba took action in the High Court claiming that Kai had trespassed on the land by erecting permanent structures on it without his consent. On 22 November 1980, Alghali J found in favour of Tamba and awarded damages for trespass and an injunction. The Court of Appeal reversed this decision on 6 April 1984, against which Tamba appealed.

Held, per Warne JSC, allowing the appeal:

1. There was abundant evidence that the identity of the land was never in doubt, including from the survey plans and evidence of the surveyor. There was no basis for the Court of Appeal to overturn the trial judge's finding of fact that Kai had validly re-conveyed the land to Tamba, after Tamba had refunded the money paid to purchase it. The Court of Appeal failed to follow the guidelines as to when it was appropriate for an appellate court to disturb the findings of fact by a trial judge. *Powell v Streatham Manor Nursing Home* [1935] All ER 58, *Clarke v Edinburgh and District Tramways Co* Ltd [1914] SLR 681 and *Dr CJ Seymour-Wilson v Musa Abess* (Supreme Court Civil Appeal No 5/79, 17 June 1981) applied.

2. In order to prove trespass, Tamba needed to show evidence that he was in possession of the land. Actual possession is a question of fact which consists of 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 varies with the nature of the land and the use made of the land in question. The standard of proof required in a case of trespass based on title to land is much higher than that based on possession. In this case, Tamba had proved he was in possession by virtue of the fact that he was the legal owner of the land based upon validity of the 1976 re-conveyance *Sesay v Kargbo & Ors* (Supreme Court Civil Appeal No 1/82, 31 December 1984) and *John & Anor v Stafford and Ors* (Supreme Court Civil Appeal No 1/75, 13 July 1976) applied.

Cases referred to

Bristow v Cormican [1878] 3 App Cas 641
Clarke v Edinburgh and District Tramways Co Ltd [1914] SLR 681
Dunford v McAnulty (1883) 8 App Cas 456
Dr CJ Seymour-Wilson v Musa Abess (Supreme Court Civil Appeal No 5/79, 17 June 1981)
John & Anor v Stafford and Ors (Supreme Court Civil Appeal No 1/75, 13 July 1976)
Kodilinye v Odu (1935) 2 WACA 336
Sesay v Kargbo & Ors (Supreme Court Civil Appeal No 1/82, 31 December 1984)
Ocean Estates v Norman Pinder [1969] 2 WLR 1359
Powell v Streatham Manor Nursing Home [1935] All ER 58
RB Wuta-Ofei v Mabel Danquah [1961] 1 WLR 1238

Legislation referred to

Supreme Court Rules 1982 rr 2(2)(b), 2(6), 2(3)

Other sources referred to
Halsbury's Laws of England [3rd Ed] Vol 30 p 739 para [1205], p 744 para [1214]

Appeal
This was an appeal by James Tamba against a decision of the Court of Appeal on 6 April 1984, which reversed the judgment of the High Court on 22 November 1980 awarding damages for trespass against the defendant, Momoh Kai. The facts appear sufficiently in the following judgment of Warne JSC.

Mr FM Carew for the appellant.
Mr EJ Akar for the respondent.

WARNE JSC: This is an appeal against the judgment of the Court of Appeal delivered on 6 April 1984 reversing the judgment of the High Court delivered on 22 November 1980. James Tamba (the appellant herein) by writ of summons dated 10 October 1977 made a claim against Momoh Kai (the respondent herein) for: (a) damages for trespass, and (b) an injunction. The facts of the case are as follows.

By deed of conveyance dated 2 October1968, one Giant Sallu Bundu sold a certain piece or parcel of land situate and lying off Main Road, Wellington in the Western Area of the Republic of Sierra Leone to one Momoh Kamara. The land was demarcated in the said conveyance thus: on the north by private property 150.0 feet; on the south by Access Road 149.5 feet; on the east by the remaining portion of the said land then in the possession of the Vendor 74.1 feet. The conveyance was tendered in evidence and marked Exhibit J. Momoh Kamara divided this land into three plots and sold one plot to James Camara Macauley. The deed of conveyance was dated 1 May 1971 and a copy was tendered in evidence and marked Exhibit F2. On the 8 April 1974, Momoh Kamara sold another portion of the said land to Momoh Kai. This conveyance was tendered and marked Exhibit E.

On 15 October 1975, James Camara Macauley sold his piece of land to Momoh Kai. A copy of the conveyance was tendered and marked Exhibit G2.

During the negotiation for the sale of land by Momoh Kamara firstly to James Camara Macauley and secondly to the respondent, the appellant was the "go between".

After Exhibit G2 had been executed between James Camara Macauley and the respondent, the respondent said that was the said piece of land he bought from Momoh Kamara. Momoh Kamara had since died. The respondent subsequently reported the matter to the CID and claimed from the appellant the sum of Le1,637.50 for expenses incurred on the land transaction. The appellant paid the respondent the money and the respondent subsequently executed a deed of conveyance in favour of appellant which was tendered in evidence as Exhibit A.

Exhibit A is the subject matter of the dispute between appellant and respondent.

The history of the proceedings is as follows:

A writ of summons issued on 10 October 1977 was accompanied by a statement of claim. I will herein set out what I consider to be the material paragraphs:

> "3. That by Indenture of Conveyance dated the 8 April 1974 expressed to be made between Momoh Kamara (principal or plaintiff) of the first part and Momoh Kai (defendant herein) of the other part, and registered as at No 310 at page 143 in Volume 266 in the Book of Conveyances in the Office of the Registrar General, Freetown, the said land was conveyed to the defendant.
>
> 4. That after the execution of the said Indenture of Conveyance someone laid claim to the said land which caused defendant to report plaintiff to the Criminal Investigation Department of Police in Freetown.
>
> 5. That the Police on receipt of defendant's report against plaintiff regarding the said sale of the said land, requested plaintiff to return the purchase price of the said land plus all expenses incurred by defendant to defendant which plaintiff willingly did.

6. By an Indenture of Conveyance bearing date 20 September 1976 expressed to be made between Momoh Kai (defendant herein), Seaman of No 66 Soldier Street, Freetown of the first part, and James Tamba, Seaman of No 8D Cemetery Road, Congo Town, Freetown of the other part and registered as No 972 at page 144 in Volume 267 in the Book of Conveyances in the Office of the Registrar-General, Freetown the said land was re-conveyed by the defendant herein to the plaintiff herein for Le1,637.50.

7. That in spite of the said conveyance of the said land the defendant has trespassed on the plaintiff's land by erecting permanent building structures on the said land without the consent of the plaintiff.

8. The plaintiff therefore claims:

(a) damages for trespass;

(b) an injunction against the defendant, his agents and servants from committing further acts of trespass;

(c) an order ordering defendant to demolish all structures erected on the said land;

(d) damages for mesne profit at the sum of Le1,000 per annum;

(e) and for any other relief which this Honourable Court may deem fit in the interests of justice."

The respondent duly filed a

defence, which was subsequently amended.

The amended defence was in the following terms:

"1. The defendant admits paragraphs 1 to 5 of the statement of claim filed herein.

2. The defendant avers that he was induced by CID Officers to sign the conveyance bearing date of the 20 September 1976 and expressed to be made between Momoh Kai (defendant herein), Seaman and James Tamba (plaintiff herein) as stated in paragraph 6 of the statement of claim filed herein but denies selling the said land therein described in the said conveyance to the plaintiff.

3. The defendant will further contend that the sum of Le1,637.50 paid by the plaintiff to the defendant was merely a refund by the said defendant to the plaintiff of the purchase price of the land originally to the plaintiff of the land originally bought from Momoh Kamara in conveyance registered as number 310 at page 143 in Volume 266 of the Book of Conveyances in the Office of the Registrar-General plus other expenses incurred in the improvement of the said land and that the defendant was not selling his land to the plaintiff and had no reason to do so.

4. The defendant will contend that he is the legal and rightful owner of the said property for which he holds a valid and registered conveyance for the said property dated 15 October 1975 and registered as No 922 at page 48 in Volume 279 in the Book of Conveyances in the Office of the Registrar-General."

The plaintiff filed an amended reply and made the following averments:

"1. The plaintiff says that paragraph 2 of the amended defence is a complete contradiction of admission, already made in paragraph 1 respectively of defence and amended defence.

2. The plaintiff denies defendant's allegations in paragraph 2 of amended defence and puts him to strict proof of his allegations.

3. Save as is herein expressly admitted the plaintiff denies each and every allegation of fact […] if the same were set out seriatim and specifically traversed."

In due course, the action went to trial, the trial commenced on 21 December 1978 before Alghali J (as he then was). Both parties were represented by counsel. The plaintiff testified and called one witness Frederick Cornelius Macauley, a surveyor. Five witnesses testified on behalf of the defendant

including the defendant himself. They were Kiss Henrietta Aubee of the Office of the Registrar-General, Mr James Seisay Kamara, Mr Lysins McEwen a surveyor, and Mr Gustavus Fowler a Deputy Assistant Registrar, Magistrate's Court.

Counsel for both parties addressed the learned trial judge on 4 and 11 June 1979 respectively, at the end of which the learned judge reserved judgment. Judgment was delivered on 22 November 1980. The judgment was in favour of the appellant. The learned judge made the following orders:

(1) that damages of Le500 be awarded against defendant;

(2) that the defendant, his servants and agents are restrained from entering the said land or to commit further trespass to the land;

(3) that what is upon the land belongs to the land;

(4) that the costs of this action to be paid to plaintiff, such costs to be taxed.

The respondent appealed to the Court of Appeal on nine grounds. I will therefore state grounds 1, 2, 9 which I think will suffice for the purpose of the appeal. They are:

(1) the learned trial judge erred in law and in fact when he held that the appellant/defendant made a valid sale of his land after the respondent's admission in his statement of claim that the land was re-conveyed to him after he had refunded the appellant's original purchase money for the land sold to the appellant by Momoh Kamara (deceased) but not the land sold to the appellant by James Camara Macauley;

(2) the learned trial judge erred in law when he failed to properly consider the appellant's defence or consider them at all;

(9) the judgment of the High Court was against the weight of the evidence.

The hearing of the appeal commenced before Short, Navo and Turay JJA on 19 October 1982 and ended on 28 March 1984 when judgment of the High Court was reversed. Judgment was delivered on 6 April 1984 allowing the appeal and setting aside the judgement and orders of the High Court.

It is against that judgment that the appellant has appealed to this court. Several grounds of appeal were filed on behalf of the appellant and argued before us by his counsel. It is not necessary to set them out. Suffice it to say that the material issues raised in this appeal may be formulated thus:

(1) Was Exhibit A a legally executed conveyance of land situate and lying off Main Road, Wellington by the respondent to the appellant?

(2) Was the identity of the land conveyed to the appellant by the respondent clearly and unequivocally defined? If the answer is in "the affirmative, then

(3) Did the respondent commit an act of trespass on the land?

(4) If the respondent committed an act of trespass on the land, is the appellant entitled to damages and an injunction?

(5) Is the appellant entitled to any other relief?

I will now proceed to consider these several issues.

It will be convenient to consider the first and second issues together. It will be re-called that the land was originally owned by Momoh Kamara (deceased). He authorised the appellant to sell the land on his behalf. The appellant divided the land into three plots. He sold one plot to James Camara Macauley, one plot to the respondent and one plot to Kelfala Kanu. The dispute arose as to whether the plot he sold to James Camara Macauley was the same plot he sold to the respondent. The deed of conveyance in respect of the plot sold to a James Camara Macauley was tendered in evidence as Exhibit F2. This was dated 15 May1971. The survey plan on Exhibit F2 was LS21A/71 which was a sub-division of survey plan LS196/67. The bearing on the beacons were Q5/71; Q6/71; Q7/71; Q8/71 and it is stated thereon certified true copy of LS21A/71.

The dimension is as follows: 75 feet by 50 feet by 75 feet by 50 feet.

The deed of conveyance in respect of the land sold to the respondent was tendered and marked Exhibit E. This was dated 8 April 1974. The survey plan on Exhibit E was LS1535/73 which is a re-survey of plan LS218/71. The bearing on the beacons were Q5/71; Q6/71; Q7/7; Q8/71.

The dimension is as follows: 74 feet by 50 feet by 75 feet by 49.6 feet.

After Janes Camara Macauley had purchased the plot mentioned above, he went to the land in 1977 and found a store being built on it. On enquiry, he found out that it was the appellant who was erecting the store. After making some representations to Momoh Kamara, the vendor, he decided to sell the land to the appellant for Le1,000. The offer was accepted, but later, after he had received the money, he said he returned it to him. He said he did this only to confirm that he owned the land. James Camara Macauley said he later found another store being erected on the same land which he discovered was being erected by the respondent. He consulted a solicitor; action was being taken when he decided to sell the land to the respondent. He sold the land to the respondent and executed a deed of conveyance which was tendered as Exhibit G2.

I will now consider Exhibit G2.

There is a survey plan attached to Exhibit G2. It is marked LS1533/75 and it is a sub-division of survey plan LS196/67. The beacons on the plan are marked Q5/71; Q6/71; Q7/71; Q8/71. The dimension is 50.0 feet by 75.0 feet by 50.0 feet by 75.0 feet.

The various plans are very revealing except for a difference of the 49.6 feet on survey plan LS 1535/73 attached to Exhibit E; the other particulars are identical.

In his evidence, Janes Camara Macauley said "I later came to know that PW1 sold the land to Momoh Kai (defendant). It was in the year between 1974 -75. Yes, the only compromise was to sell the same land to Momoh Kai though I know PW1 had sold it to him. Yes Momoh Kai told me that this land I was claiming was sold to him by PW1. I see Exhibit A it is a conveyance from Momoh Kai to James Tamba."

PW1 is the appellant and Momoh Kai is the respondent. What did the respondent say in respect of this transaction with James Camara Macauley? The respondent testified as follows: "I recall buying a plot of land from Momoh Kamara through PW1. I paid for the land through PW1 to Momoh Kamara, I paid Le600.00. A conveyance was executed in my favour. There was a dispute concerning this land. I was later summoned by DW2 for the said land, he claiming ownership of the said land. Before the dispute arose, I had built a store on the land I bought. The store was demolished so I reported it to PW1. Later Momoh Kamara, PW1, told me to build the store again as I was the owner of the land, so I erected a store again. I then started to build a dwelling house on the land. DW2 issued a writ against me. I went to the Registrar-General's Office and I discovered that some land which I had bought from Momoh Kamara through PW1 was in fact registered under the name of DW2 as the owner. As a result, I contacted DW2 concerning the said land telling him that I now realised he is the registered owner of the land. I later re-negotiated to purchase the land from DW2 for Le1,470.00 after which a conveyance was executed in my favour."

It will be observed that the foregoing evidence was given by and on behalf of the respondent. It is necessary to consider the evidence of the appellant in this regard. He states: "The land which was given to me to be sold by Momoh Kamara I divided into three portions, the first plot is the portion I sold to James Macauley also known as James Camara Macauley. The middle plot I sold to Momoh Kai the defendant and the third plot I sold to Kelfala Kanu. I executed a conveyance to the defendant Momoh Kai on 8 April 1974. The defendant paid Le600 for the plot. After the conveyance was executed in 1975, I was invited to CID Headquarters, I met the defendant there. I was asked if I know him. I answered in the affirmative. I was asked if there was any dealing between us regarding land at Wellington, off Main Road. I told them he gave me money for land to Momoh Kamara. I told them he paid Le600.00 to the said Momoh Kamara (defendant, deceased). He now wants Le1,637.50 for the same land sold previously to him for Le600.00. He said he had developed the land. I paid this amount of Le1,657.50 to the CID Headquarters and the defendant handed over all the documents to me again. The defendant re-conveyed the same land to me in 1976. The conveyance was executed to me in my name." This conveyance was tendered with no objection as Exhibit A.

This is a convenient point at which to examine Exhibit A. Exhibit A is a deed of conveyance made between Momoh Kai and James Tamba. The survey plan is marked LS1766/75 and is a re-survey of LS21A/71.

The beacons are marked Q5/71; Q6/71; Q7/71; Q8/71. The dimension is shown as 50 feet by 74 feet by 49.6 feet by 75 feet. The common feature which runs through the various plans mentioned above is the markings on the beacons, that is to say, Q5/71; Q6/71; Q7/71; Q8/71.

When the respondent was executing the deed of conveyance Exhibit A he well knew what he was doing although he testified that he was forced into signing the document by the CID.

It must be recalled that it was the respondent who invited the CID into a purely civil matter. How can he then be heard to say that undue influence was brought to bear on him to sign the document? The respondent had already received Le1,657.50 for what the respondent called "my money expenses which were refunded to me by PW1 at the CID. As a result of my complaint to them PW1 refunded Le1,600.00 plus the capital expenses incurred on the land." The inference I can draw from the evidence is that the respondent having discovered that he could not enjoy the free and undisturbed possession of the land in dispute, opted voluntarily to dispose of it; albeit, to the appellant who originally got him involved in the whole transaction. I do not agree with the Court of Appeal, when it declared that: "the conveyance referred to in Exhibit A is the purported re-conveyance by Momoh Kai to James Tamba dated 20 September 1976." In my view, Exhibit A was a genuine and legally executed conveyance voluntarily made by the respondent. The answer to the first issue is therefore in the affirmative.

There is abundant evidence that the identity of the land was never in doubt. The evidence of the appellant, the evidence of the respondent, the evidence of James Camara Macauley, the evidence of Mr McEwen the surveyor and the various exhibits that is to say, exhibits A, F2, G2, E speak eloquently of the identity and give a clear demarcation of its boundary.

Apart from the evidence of the appellant, the respondent himself conceded that the land he conveyed to the appellant and demarcated in the plan on Exhibit A was the plot sold to him originally by Momoh Kamara, which was subsequently claimed by James Camara Macauley. He conceded also that was the piece or parcel of land James Camara Macauley sold to him.

The evidence of Mr McEwen is too cogent to be ignored. I am surprised that the Court of Appeal was not attracted by such evidence. Indeed the Court of Appeal dismissed the evidence of both surveyors summarily. In my view, the Court of Appeal misdirected itself on the evidence touching and concerning the identity of the land. It is quite clear that if the court had carefully considered the survey plans on the various exhibits culminating in Exhibit A and the evidence of Mr McEwen, the identity of the land would have been made crystal clear to the Court of Appeal.

Even Exhibit C which was tendered as an encroachment plan is in the perimeter of land enclosed by beacons Q5/71; Q6/71; Q7/71 and Q8/71.

In my view, the Court of Appeal did not attach much weight to the survey plans, which, with respect, was unfortunate. The learned trial judge considered them, and the identity of the land was proved by evidence. I hasten to add that the three plots of land into which the land of Momoh Kamara was divided and given in evidence, in my opinion, misled the Court of Appeal. The powers of the Court of Appeal to disturb a finding of fact by the trial judge has been well established by a series of decisions over the years. These powers are exercised based on well-established principles: see *Powell v Streatham Manor Nursing Home* [1935] All ER 58. The headnote states:

> "On an appeal from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The court has the same right as the trial judge to come to decisions on issues of fact as well as of law. But the court is still a Court of Appeal, and in exercising its functions it is subject to the inevitable qualifications of that position. Where the question is one of credibility, where either story told in the witness box may be true, where the probabilities and possibilities are evenly balanced, and where the personal motives and interests of the parties cannot but affect their testimony, an appellate court should be reluctant to differ

from the judge who has seen and heard the witnesses and has had the opportunity of watching their demeanour, unless it is clearly shown that he has fallen in error."

This was a case decided in the House of Lords. Among the Law Lords who gave concurring judgments was Lord Wright. In his judgment the learned Law Lord referred to the principles laid down in *Clarke v Edinburgh and District Tramways Co* Ltd [1914] SLR 681 and then said:

"Two principles are, I think, beyond controversy. First it is, I think, clear that in an appeal of this character, that is from a decision of a trial judge based on the opinion of the trustworthiness of witness who he has seen, the Court of Appeal in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong: *Bland v Ross (The Shop 'Julia')* (1860) 14 Moo PC 210 at p 235 per Lord Kingsdown, cited with approval by Lord Sumner in *SS Hontestroom v SS Sagaporack* [1927] AC 37 at p 48. And secondly, the court has no right to ignore the facts that the judge has found on his impression of the credibility of the witnesses and proceed to form its own view of the probabilities as if there has been no oral hearing. Lord Summer protested against such a course being taken; he thus stated in *SS Hontestroom v SS Sagaporack* [1927] AC 37 at p 50 what to his mind were the proper questions which the appellate court should propound to itself in considering the conclusions of fact of the trial judge:

"(i) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence?

(ii) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(iii) Is there any glaring improbability about the story accepted, sufficient in itself to constitute a 'governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact, or any extreme or overwhelming pressure that has had the same effect?"

Did the Court of Appeal give heed to the above guidelines? I do not think so. See also the case *Dr CJ Seymour-Wilson v Musa Abess* (Supreme Court Civil Appeal No 5/79) decided in this court on 17 June 1981, Livesey Luke CJ said at p 66:

"There is no doubt that an appellate court has power to evaluate the evidence led in the court below reach its own conclusion and in a suitable case to reverse the findings of fact of a trial judge. But those powers are exercisable on well settled principles and an appellate court will not disturb the findings of fact of a trial judge unless those principles are applicable. The principles have been frequently stated locally and in other Commonwealth countries."

In view of what I have stated above, there was no justifiable reason for the Court of Appeal to disturb the finding of fact of the learned trial judge.

Having found that the identity of the land is not in doubt, I will now consider whether the appellant was in possession of the land. I have already found that the appellant was armed with a validly executed conveyance relating to the land i.e. Exhibit A. However he is not claiming for a declaration of title, he is claiming for trespass to a piece or parcel of land based on Exhibit A.

In order to prove trespass the appellant must show by evidence that he was in possession of the land.

"Trespass to land is an entry upon or any direct and immediate act of interference with the possession of land."

This was so stated by Mrs Justice AVA Awunor-Renner in the case of *Sesay v Kargbo & Ors* (Supreme Court Civil Appeal No 1/82, 31 December 1984). The learned justice then referred to two passages of *Halsbury's Laws of England* [3rd Ed] Vol 30 at p 739 para [1205] and p 744 para [1214]. She then referred to the cases of *RB Wuta-Ofei v Mabel Danquah* [1961] 1 WLR 1238, *Bristow v Cormican* [1878] 3 App Cas 641 at 637 and *Ocean Estates v Norman Pinder* [1969] 2 WLR 1359 at

1364. After the learned justice had stated the principles of law enunciated in those cases, she had this to say:

> "Actual possession is a question of fact which consists of 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."

I entirely agree with the learned justice and would not add anything more. The standard of proof required in a case of trespass based on title to land is much higher than that based on possession; see the case of *John & Anor v Stafford and Ors* (Supreme Court Civil Appeal No 1/75, 13 July 1976) per Betts JSC pp 11-12. This judgment is very instructive and the ratio decidendi can be applied with equal force in the instant case. The respondent in his statement of defence has claimed "that he is the legal and rightful owner of the said property dated 15 October 1975 registered as No 922 at p 48 in Volume 279 in the Books of Conveyances in the Office of the Registrar General." The respondent gave evidence in support of his claim.

In another case *Dr CJ Seymour-Wilson v Musa Abess* (Supreme Court Civil Appeal No 5/79, 17 June 1981) the learned Chief Justice referring to the case of *Kodilinye v Odu* (1935) 2 WACA 336 at 337-338 said inter alia:

> "Quite apart from the rule first stated above it is relevant to mention that the defendant pleaded in his defence that he was in possession of the disputed land. That plea is in accordance with Order XVIII Rule 20 of the High Court Rules. The effect of such plea is a denial of the allegations of facts in the statement of claim."

The learned Chief Justice then referred to the case of *Dunford v McAnulty* (1883) 8 App Cas 456.

Has the appellant proved the averment that he was in possession? In my opinion, he has by virtue of Exhibit A. The learned trial judge did not make any specific finding that the appellant was in possession at the time of the trespass by the respondent. Nevertheless the learned trial judge made a positive finding of fact that the appellant was the legal owner of the land by virtue of Exhibit A. I do not think this finding ought to have been disturbed by the Court of Appeal. This is in complete disregard of the principles laid down over the years as to when a Court of Appeal can disturb a finding of fact by a trial judge. The Court of Appeal deprived itself of the opportunity to disturb this finding of fact when it held that "the real 'res' for identification in this case was which of the three plots of land being Off Main Road, Wellington, *not the land* Off Main Road Wellington. This in my respectful view, was the crux of the matter which eluded the learned judge's attention, and which was never identified with any precision." In my opinion, the identity of the land did not elude the learned trial judge's attention, nor did it elude my attention either. The evidence is clear and unmistakable.

For the reasons I have stated above, I will give the answer to the third issue in the affirmative and hold that the respondent committed an act of trespass on the land owned by appellant.

Is the appellant entitled to damages and injunction? I believe he is entitled to damages and the injunction prayed for.

No evidence was given to warrant a relief for mesne profit. In the circumstances I will allow the appeal, set aside the judgment and orders of the Court of Appeal, restore the judgment of the High Court in respect of trespass and the consequent damages awarded and the injunction ordered.

I will also award taxed costs to the appellant incurred in the High Court and the Court of Appeal respectively. Costs occasioned by this appeal to the appellant assessed at Le500.

Hon Mr Justice SMF Kutubu CJ: I agree. **Hon Mr Justice CA Harding JSC**: I agree. **Hon Mrs Justice AVA Awunor-Renner JSC**: I agree. **Hon Mr Justice S Beccles Davies JSC**: I agree.

Reported by Patrick Fofanah