S. C. CIV.APP. 3/2008

IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

Hon. Mrs. Justice S. Bash-Taqi, JSC (Presiding)
Hon. Mr. Justice P. O. Hamilton, JSC
Hon. Mrs. Justice V. A. D. Wright, JSC
Hon. Mr. Justice M. E. Tolla Thompson, J SC
Hon. Mr. Justice N. C. Browne-Marke, JA

BETWEEN:

ALPHA ABDUL WAHID SALLU
KELFALA SESAY
MOHAMED KOROMA **APPELLANTS**

AND

SHARBEL ABRAHIM MILHELM HAROUN
JOSEPH ABRAHIM MILHELM HAROUN **RESPONDENTS**

E. E. C. Shears-Moses, Esq. for the Appellants
Yada Williams Esq. O. Jalloh, Esq. & O. Kanu, Esq. for the Respondent

JUDGMENT DELIVERED THE 13TH DAY OF MARCH 2012

S. BASH-TAQI, JSC: - This is an appeal from a Judgment of the Court of Appeal dated 20th June 2008 and it concerns land at Wilberforce in the Western Area. The action was commenced by the Respondents as Plaintiffs, by Writ of Summons dated 15th June 2004. They claim inter alia that they are the fee simple owners of the land in dispute situate at No. 10 Regent Road Wilberforce Freetown. They further alleged that they became the fee simple owners of the said land by virtue of Conveyance, dated 1st July 1948 made between **Mary Priscilla Macauley** as Vendor and Abraham Milhelm, Anis Milhelm and Michel Milhelm, as Purchasers, and Conveyance dated 29th June 1949 between Jemima John, Vendor and Abraham Milhelm as Purchaser. Both Conveyances were tendered in evidence in the High Court as Exhibits "A1" & "C1". (See pages 98-100 & pages 129-131).

BACKGROUND

The relevant facts of this case are as follows: - Abraham Milhelm, Anis Milhelm, and Michel Milhelm, were three brothers trading together under the business name of "J. Milhelm & Sons". During their joint trading days they acquired other properties at 24 East Street Freetown, and No 5 Westmoreland Street, (now Siaka Stevens Street) Freetown in addition to the properties in Exh. "A1"and "C1" at Wilberforce Freetown. The Respondents herein are the two children of Abraham Milhelm.

On 31st December 1958, Abraham Joseph Milhelm died survived by his widow and the two Respondents as his beneficiaries, and by his Last Will and Testament dated 30th August 1954, he appointed Michel Joseph Milhelm, as one of the Executors. The Will was probated on 11th February 1959 in the Probate Registry of the High Court.

On 31st July 1971 the surviving brothers agreed to divide the properties acquired from their joint trading with the Respondents. They signed a Deed of Family Arrangement whereby the Respondents relinquished their interests in the properties at 24 East Street Freetown and 5 Westmoreland (Siaka Stevens) Street, in favour of Michel Milhelm and Anis Milhelm in return for properties at Nos. 8 & 10 Regent Road Freetown. The Deed was registered as No 553/71 in Volume 248 at Page 63 in the Book of Conveyances.

In 1988, the Respondents sold the property at No. 8 Regent Road Wilberforce to a Mr. Daswani and retained No. 10. In 1994, during the civil war in the country, the Respondents fled to Lebanon leaving one Fayama Koroma as caretaker of their property at No. 10 Regent Road. In 1994 the Appellants caused Fayama Koroma to be evicted from the property.

On return to Sierra Leone the Respondents instituted this action in the High Court against the Appellants seeking inter alia (i), a Declaration that the fee simple title to the land and hereditaments situate lying and known as at No 10 Regent Road Wilberforce is vested and belongs to them, (ii) An Order expunging from the Register Books of Statutory Declarations the joint Statutory Declaration sworn on 29th December 2003 registered as No.96 at Page 78 in Volume 81 establishing possessory title of the 1st Appellant on the grounds of fraud, (iii) General damages for trespass on the Respondents land at No. 10 Regent Road Wilberforce, Freetown.

The Writ of Summons was served on the Appellants on 23rd June 2004. When the Appellants did not enter appearance, the Respondents' Solicitor entered Judgment in default of Appearance on 15th July 2004 and caused

the 1st Appellant's Statutory Declaration to be expunged from the Records kept at the Registrar-General's Office. Subsequently, the Appellants did enter an appearance on 13[5h] July 2004, but without setting aside the Judgment in Default of Appearance. And when, the Appellants failed to file a Statement of Defence, the Respondents' Solicitors again entered Judgment in Default of Defence on 11th January 2005.

On 21st January 2005, the Appellants applied for leave to file a Defence. The application was granted on 21st February 2005 and they filed a Defence on 7th March 2005 which I will endeavour to summarize briefly here.

The Appellants denied the Respondents' claim and averred that the Respondents had unlawfully entered their property in 1988 and sold a portion of it to Mr. Daswani; that this caused the 1st Appellant's father, Pa Sallu, to make a complaint to the then Inspector General of Police, Mr. Bambay Kamara, who effected a compromise to the effect that since the Respondents had sold the property at No. 8 Regent Road to Mr. Daswami, they should not interfere with Pa Sallu's ownership at No. 10 Regent Road. The property numbered 10 Regent Road Wilberforce is the property now in dispute.

After the death of his father in 1989, the 1st Appellant and two others swore to a joint Statutory Declaration on 29th December 2003 to establish his possessory title to the property at No. 10 Regent Road Wilberforce. He said that he lived on the property during all the years from 1988 following his father's death with no adverse claim being made against him. He denied that he obtained the Statutory Declaration fraudulently. He stated further that his father, Pa Sallu, made a gift of the property to him before his death but he was unable to prepare the deed transferring ownership of the property. He denied that No 10 Regent Road Wilberforce belongs to the Respondents.

These briefly were the state of the proceedings when the matter went to trial before Matturi-Jones, J, (as she then was) in the High Court, and she, having heard the witnesses and examined the exhibits dismissed the Respondent's claim. She held as follows:

> *"Considering all the evidence in this case, and having listened to the arguments by both Counsel for the Plaintiff and (the Defendant) and I am not satisfied that the Plaintiff has proved their claim as appears in the Writ of Summons filed in this case. I therefore dismiss their claim for a*

declaration as fee simple owners, general damages and costs....."

The Respondents dissatisfied with the above Judgment appealed to the Court of Appeal.

When the appeal came up before their Lordships in the Court of Appeal, they discovered that neither of the two Judgments in default has been set side when the matter proceeded to trial before the High Court. They held that they could not proceed with the appeal as they lacked jurisdiction to do so. This was how the Presiding Justice of Appeal puts it:

"The law is settled that jurisdiction is fundamental in any Judicial process. As it has been clearly demonstrated above, any Judgment however irregularly obtained stands until it is set aside. In this case the irregular judgment was not set aside or vacated at the time the matter went to full trial. As stated earlier the Learned Trial Judge should have stopped the case when she discovered that the Statutory Declaration had been expunged from the records. In the premises, it is fruitless going into the merits of this appeal. You cannot have two contradictory judgments in one action.....As the Judgment in Default of Appearance dated 15th July 2004 has not yet (been) set aside I hold that it still stands."

The Appellants have now appealed to this Court on four (4) grounds:

(i) The learned Justices ignored the order dated 21st February 2005 consequent upon the granting of the application dated 21st January 2005 could not have been made if the Court recognised the Judgment in default of appearance.

(ii) The learned justices having held that the Judgment in default of appearance was irregular were wrong in law to affirm it, as it affected the jurisdiction of the court.

(iii) The learned justices did not have the full records and so deliberated on an incomplete record of the proceedings in the High Court as the Notice of Motion dated 21st January 2005 was not included in the records even though Solicitor for the Appellants had asked for it at settlement.

(iv) The learned Justices failed to evaluate the evidence before the Court.

Several submissions have been made on behalf of both the Appellants and the Respondents, Briefly on the one hand, Mr. Shears-Moses for the

Appellants argued inter alia, that since the Justices of Appeal acknowledged that the Judgment in default of appearance was irregular as appearance had been entered before the Judgment was signed, and the Trial Judge had gone on to pronounce a regular Judgment after hearing evidence, the Court of Appeal should have invoked Rules of the Court of Appeal to enable them set aside both irregular Judgments and proceed to give Judgment on the merits of the appeal as if there were no default Judgments. He stressed that the Court of Appeal has the same powers to give any Judgment and make any order that ought to have been made by the High Court under the said rule; that by upholding the irregular Judgment instead of the Trial Judge's regular Judgment, the Court of Appeal approved an irregularity which has led to injustice.

He further submitted that their lordships misdirected themselves when they held that there were two Judgments in the action, when it was clear that one of these is irregular; that they lost sight of the fact that the Learned Trial Judge had on 21st February 2005 granted leave to the Appellants to file a defence thereby nullifying the irregular Judgments. He submitted that the Appellant's document of title was not crucial in the action so that by upholding that the High Court lacked jurisdiction to hear the matter because the 1st Appellant's Statutory Declaration had been expunged from the Records, their Lordship failed to consider the principle of law that a Plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's title. He concluded that the Court of Appeal failed to evaluate the evidence when they held that it was fruitless to go in to the merits of the appeal. As regards the facts, Mr. Shears-Moses submitted that the land that was conveyed in exhibit "A1" by Jemima Cole to Abraham Milhelm in 1949 made no reference to the number of the property being No. 8. He referred to Pages 129-132 in support of this submission.

As regards the property conveyed in Exhibit "C1", that is, No. 10 Regent Road, by Mary Priscilla Macauley to Abraham Milhelm, he submitted that the property is located on the Southern boundary of Regent Road, but that the Survey Plan in Exhibit "A1" which was made in 1948, shows adjacent properties belonging to a Mrs. Davies on the one hand and property of Mr. Milhelm on the other hand. He concluded from that that the property in Exh. "A1" is not the same property the Respondents are claiming, since Mr. Milhelm was not the owner of the adjacent property in 1948. He stressed that what was conveyed in Exh. "A1" was property known as No. 8a, not No 10 Regent Road and that since the Respondents are here claiming No. 10 Regent Road, they have the burden of proving that No.10 has always belonged to them. Counsel concluded that the Respondents have not established a clear title to No. 10 Regent Road.

On the issue of possession, Mr. Shears-Moses submitted that the 1st Appellant's father and family had lived on the property in dispute for several years and because of such occupation they must have built structures on the land evidencing ownership. He relied on the evidence of DW2 who testified that he "knew the 1st Appellant's father on the land and they worked on it for him". Finally he submitted that though the Respondents have produced Conveyances purportedly for the property in dispute these have not sufficiently identified the property at No. 10 Regent Road as the property to which they relate. He asked that the appeal be upheld.

Counsel for the Respondents conceded that the learned Trial Judge's order of 21st February 2005 did set aside the Judgments in default and gave the Appellants leave to defend the action. He also conceded that the Court of Appeal should have gone into the merits of the appeal as if there was no irregular Judgment. By conducting the trial the Learned Trail Judge effectively set aside the Judgments in default entered against the Appellants. Counsel therefore urged this Court, being the final Court of Appeal, to re-hear the appeal by reviewing the evidence before both the Trial Judge and the Court of appeal, and to give any Judgment or Order that ought to have been given/made by the Court of Appeal citing Rule 57 of the Supreme Court Rules Public Notice No.1 of 1982 in support of his submission. Counsel's other submissions in respect of the evidence and facts of the case are to be found in the case for the Respondents filed herein. It is not necessary to set down all the submissions here, but I shall refer to some of them in the course of this Judgment as and when the need arises. I have also taken into consideration Rule 57 of the Supreme Court Rules Public Notice No. 1 of 1982.

Both Counsel have urged this Court to re-hear the appeal on the merits. It is the duty of the Courts to ensure that justice is done to litigants who come to our Courts. It will serve no useful purpose to remit the case to the High Court for rehearing. Since this Court can make any order vested in the High Court, I will exercise my discretion under the Rules quoted to proceed to review the case on the merits in order to put an end to this matter which has been in the Courts for the past seven years, i.e. since 15th June 2004.

As both Appellants and Respondents are claiming ownership of the property in dispute, the first point which I have to consider is the question whether either party proved that they have a better title to the land in dispute. I will assure Mr. Shears-Moses that I will not lose sight of the fact that this is an action for a declaration of title and since the

Respondents are claiming to be the fee simple owners of the property in dispute, they have to prove that they had title in themselves or through some person from whom they are claiming. The question to be determined is whether the Respondents have done so from the evidence they have actually adduced to establish their title and thereby entitled them to the declaration of title they are seeking.

In this regard it will be necessary to examine the Respondents' title and the titles of those from whom they claim to have derived same. In a long line of cases beginning from ***Macauley vs. Stafford and Others*** *(SC* Civ. ***App. 1/73)*** to the leading authority of ***Seymour Wilson vs. Musa Abbess (SC Civ. App. 5/79) delivered on 17/06/81*** (***unreported***) it has been established that in an action for a declaration of title the Plaintiff must succeed on the strength of his own title and not on the weakness of the Defendant's title. In other words, in the word of Webber, CJ:

> *"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 the onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a Judgment decrees no title to the defendant he not having sought the declaration. "(See also* ***Kodolinye vs Odu (1935) 5 WACA 336 at Pages 337-338)***

The above passage was cited with approval be Livesey Luke C.J. in *Seymour Wilson supra.*

It is clear that both parties are relying on paper titles and both produced conveyances in fee simple as proof of their title. In the words of Livesey Luke C.J in ***Seymour Wilson supra***, the Learned C.J had this to say regarding paper titles of Conveyances:

> *"The mere production in evidence of a conveyance in fee simple is not proof of a fee simple title. The document may be worthless. As a general rule the Plaintiff must go further and prove that his predecessor-in-title had title to pass to him. And of course if there is evidence that the title to the same land vests in some person other than the vendor or the plaintiff, the plaintiff would have failed to discharge the burden on him."*

In the instant case, the question arises whether the Respondents have discharged the burden put on them to prove they were the fee simple

owners of the land in dispute. As I have already stated earlier in this Judgment, the Respondents, who were Plaintiffs in the High Court action, based their claim to the property on Exhibits "A", "B" and A Deed of Family Arrangement appearing at Pages 136 & 137.

Their case is that Mary Priscilla Macauley, the Vendor in Exh. "C1" was the fee simple owner of the land which she then conveyed to Abraham Milhelm, Anis Milhelm and Michel Milhelm in 1949. The root of title recited in Exbibit "C1" states that she acquired the fee simple in the property from her father Samuel Ajayi who up to the time of his death in 1902 was in possession of the property; that after his death in 1902 the piece of land became vested in her mother, Nancy James, until the latter's death in 1911. She swore to a Statutory Declaration on 10th August 1911 when she was of the age of Sixty-Two (62) years declaring the above facts. She deposed that since her mother's death in 1911, she had been in full free and undisturbed possession of the property until she sold the same to the Respondents' father and uncles on 1st July 1948. The piece of land acquired thus by the Respondents is located between Regent Road and Spur Road in what was formerly known as Old Railway Track. It is bounded on the North by Property of the Purchasers, i.e. Abraham Milhelm, Anis Milhelm and Michel Milhelm for a distance of 351 feet; on the South by property of Mrs. Elizabeth Davies for a distance of 290 feet; on the East by Regent Road for a distance of 64 feet and on the West by Spur Road for a distance of 125 feet.

The Respondents' second predecessor-in-title was Jemima Cole, the Vendor in Exh. "A". The root of title recited in Exh. "A1" states that she also derived her fee simple title through long possession, and that she had been "in full free and undisturbed possession of the piece or parcel of land for over thirty-three years" prior to 29th June 1949 when she sold the property to the Respondents' father. The piece of land is located between Regent Road Wilberforce and Motor Road Wilberforce and is bounded on the North by the property of one Mr. Vincent for a distance of 385 feet; on the South by property of Mr. J Milhelm for a distance of 357 feet; on the East by Regent Road for a distance of 66 feet, and on the West by Motor Road for distance of 98 feet.

These two properties were blended together in 1971 to make up Nos. 8 & 10 Regent Road Wilberforce by the Deed of Family Arrangement.

On the facts of the case, to be entitled to a declaration of title, the Respondents must prove that they have a better title not only as against the Appellants, but that there is no other person having a better title than himself. To succeed they have to prove that they acquired the fee simple

title from their predecessors-in-title, in this case Mary Priscilla Macauley and Jemima Cole. As I have stated documentary and oral evidence was led to show that both Mary Pricilla Macauley and Jemima Cole had title to the pieces of land which they conveyed respectively to Abraham Milhelm and his two brothers in 1948 and to Abraham Milhelm as sole purchaser in 1949.

The 1st Appellant based his claim to the property in dispute on a joint Statutory Declaration sworn to on 29th December 2003 by himself and two others. No evidence was led to prove that the 1st Appellant's father had any title to the land which he purported to give to the 1st Appellant in 1988. By his possessory title the 1st Appellant relies on the fact of possession by himself and his father Pa Mamadu Sallu. In their Statement of Defence the Appellants pleaded inter alia at Paragraph 1, "that the land in dispute was from time immemorial the property of the father of the 1st Defendant (1st Appellant). He also claims by virtue of a Statutory Declaration dated 1stDecember 2003. This Statutory Declaration was also relied at the trial and accepted by the Trial Judge. His case to ownership of the land will therefore stand or fall on his documentary title.

In his evidence in Court, the 1st Appellant identified a Statutory Declaration which appeared to be a photocopy of the original document. The Trial Judge having recorded that the Appellant's document had been expunged from the Records in Registrar-General's Office following the Judgment in default of appearance entered against him 15th July 2004, she allowed the photocopy to be used and the 1st Appellant was cross-examined on the document. It thus became part of the Record in the action.

Having said that, it is now necessary to examine the Statutory Declaration which the 1st Appellant is relying on and which purports to give him title to the land in dispute. I will in the first instance compare what he deposed to in that document with his oral evidence in Court and the oral evidence of his witnesses as to the acquisition of the land.

In his declaration what the 1st Appellant deposed was as follows:

"1. *I am the son of the late Mamadu Sallu of 10 Regent Road Wilberforce Village Freetown in the Western Area of Sierra Leone who died on 3rd December 1989 leaving me his child.*

2. *That I know well a certain piece of land situate at No 10 regent Road Wilberforce .....and boundaries are shown*

verged RED on the survey plan L.S. 1148/03 attached to these present.....".

3. *That the said piece or parcel of land with house was the lawful property of my late father the said Mamadu Sallu who had lived on the land with me for all his life until his death".*

At the trial and under cross-examination the 1st Appellant had this to say: concerning his father's acquisition of the property in dispute:

".....I know the property at 10 Regent Road Freetown. My late father Mamadu Sallu owned it. He died 3/12/89. At the time I was in Tunisia in North Africa. I know how he came to live at 10 Regent Road. He was an Old Soldier in Burma war. All of us were born there (children of father: 10 Regent Road".

"I was small but I say it was after the Burma War that father got into occupation. Before leaving I did not (know) if father was ever challenged for this property.
I returned to Sierra Leone in December 2002. On my return I met my mother Sia Kandoh in Bangayama Kono. She said you pa died but the property were ee yet (lef) may (mek) you know about am...I will show you how to get it. He (She) said go and meet Kaifala Sesay who will tell you enough about the land. She said she was old.....I went to Kaifala Sesay in Kabala. He said he knows the land from 1955/60. He explained all to me and I followed the information."

He said further:

"My father died in my absence. My father's (documents) were given to me, I have them. They are up country in Bongayama with my sister-Neneh Sallu. I say the property (as) is owned by my father."

The fact that his father acquired the property after the Burma War does not appear in the Statutory Declaration. The 1st Appellant's Statutory Declaration does not contain any substantial facts on which his claim to ownership of the land is based. There is no mention of how and when the Appellant's father acquired the land, or indeed how long he had been in possession or occupation of the land. There are clear inconsistencies between his evidence and what he deposed to in his Statutory Declaration. Firstly, in his evidence in chief at pages 43-44, the 1st Appellant said his father had documents of title for the land which he gave to him and which he in turn gave to his sister. He did not deposed in

his Declaration to receiving documents of title from his father nor did he depose that his father had any such documents. Furthermore, the he deposed in his declaration that he had lived with his father on the land in dispute all his life until his father's death. However looking at the evidence-in-chief of Kelfala Sesay, DW2, at Page 47 he said: *"Pa Sallu died in DW1's absence. He used to come to No. 8 /10 with his mother on holidays."* This shows another serious discrepancy in the evidence of the witnesses, especially so as the 1st Appellant is claiming title through long possession. Again there is no evidence of how old Pa Sallu was when he died. This would have perhaps assisted the Court to calculate the number of years he had been on the land prior to his death in 1988.

Turning to the evidence of Kelfala Sesay, the 1st Appellant's second witness he had this to say about the 1st Appellant's ownership of the property in dispute:

> *"I know DW1 (Sallu). I know his father Mohamed Sallu. He is dead. I know him since 1958. He was then our chief/ leader at Wilberforce. Defendant's father was at No. 8 & number 10. I stayed at No. 2 Regent Road Wilberforce. Defendant's father was at No. 8 & 10. That is where we used to go and work for DW1's father at number 8 & 10. We used to make cassava/Cocoa heaps there. I was there 1967/68.....In 1967, I left and returned in 1988 to 1989.On my return I found Pa Sallu at the same place (No. 8 & 10 Regent Road Wilberforce) Pa Sallu came and said Kelfala and Kakibody should accompany him to see Banbay Kamara to witness. I went with him. I saw two Lebanese. Bambay said we don tay pan dis word ar want to refer you to court. He said the Lebanese did not do fine. The Lebanese said ' nor pass we'.....Bambay said the Lebanese will talk the truth "tomorrow' and that we should be there day after 'tomorrow'. We returned on the day Bambay said, The Lebanese is a thief.....Bambay said this would not happen in Lebanon. The Lebanese gave a paper to Pa Sallu....."*

The sum total of this witnesses' evidence is that Pa Sallu was occupying Nos. 8 and 10 Regent Road Wilberforce. The Appellant's claim is for No. 10 Regent Road Wilberforce.

Throughout the proceedings no other document was produced or tendered by the 1st Appellant to substantiate his claim, although he said his sister had the documents for the land up country. We have also not seen "the paper that the Lebanese gave to Pa Sallu" on the occasion when they were before Bambay Kamara for the compromise.

At Page 96 of the Records, James Bangura, the 1st Appellant's Surveyor, states:

> *"LS 929/71 was a survey of both No. 8 & 10 Regent Road Wilberforce whilst LS1148/03 was a survey of No. 10 Regent Road, Wilberforce.(see diagram attached)*
>
> *These two properties are situated between Regent Road and Spur Road We measured along Regent Road for No.8 and No. 10 Wilberforce and had 94.25 and 31.0 feet respectively.*
>
> *We then went to measure along Spur Road and had 50.0feet and 157 feet for both No.8 and No.10 Regent Road Wilberforce respectively.*
>
> *From what I see from the two documents (LS 929/71 and LS1148/03) LS 929/71 was later re-surveyed and subdivided in 1988, separating No. 10 & No. 8 into two separate properties, that is plots 1 and 2 of LS379/88.*
>
> *The document of Alpha Abdulai Wahid Sallu is a re-survey of plot1 of LS379/88."*

The Respondents' evidence is that L.S. 929/71 was prepared when their uncles, Anis Milhelm and Michel Milhelm agreed that properties acquired by them and the Respondents' father Abraham Milhelm during their joint trading as "J. Milhellm & Sons", should be divided with the beneficiaries of Abraham Milhelm. The Deed of FamilyAarrangement which was executed to transfer ownership of the property at 8a Regent Road Wilberforce to the Respondents as tenants in common, was surveyed in 1971 with a Survey Plan attached incorporating both Nos. 8 & 10 Regent Road Wilberforce, presumably the two properties bought from Priscilla Macauley and Jemima John in 1948 and 1949 respectively.

The gist of James Bangura' s evidence is that Survey Plan L.S 929/71, is a Survey of both properties at Nos. 8 & 10 situated between Regent Road Wilberforce and Spur Road. In 1988, the property was divided into two Plots, (1 & 2), that is to say No. 10 Regent Road being Plot 1 and No. 8 Regent Road being Plot 2. This is reflected in Survey Plan L.S. 379/88. The evidence is that the Respondents sold No. 8, that is, Plot 2, to one Daswani leaving Plot 1, that is No. 10 Regent Road for themselves. It was the piece of land (Plot 1) numbered 10, that the Appellant re-surveyed in 2003 to use in his Statutory Declaration.

The composite Plans produced by Mr. James Bangura, the Appellant's Surveyor, are shown at Pages 109 & 110 of the Records. The Composite Plan at Page 109 is headed:-

> *"Composite Plan Showing LS 929/71 Property of Charbal Milhelm and Joseph Milhelm and LS 1148/03 Property of Abdulai Wahid Sallu situate at Nos. 8 & 10 Regent Road Wilberforce Village."*

The acerage of land for each plot is not mentioned, but both are said to be properties situate at Nos. 8 & 10 Regent Road Wilberforce Village. Furthermore, apart from being a sub-division of the Respondents' Plan, the Appellants' Survey Plan L.S 1148/03 attached to the Statutory Declaration contains significant alterations, which, in my view, is incapable of passing title to the land to the Appellants

The Composite Plan at Page 110 shows an identical Plan to that of the Respondents headed: -

> *"Property of Carbal Milhelm and Joseph Milhelm situate at nos. 8 & 10 Regent Road Wilberforce Village measuring 1.2057 Acres."*

The plan is a certified true copy of L.S 929/71, which is the original Survey Plan showing the Respondents' properties at Wilberforce.

Apart from the Statutory Declaration, the 1st Appellant is also relying on his actual possession of the land. In Paragraph 1 of his Statement of Defence he contends that the land in dispute was 'from time immemorial the property of his father' and he lived there with him all his life. I shall therefore consider the issue of Possession.

As I have stated earlier in this Judgment it is trite law that a Statutory Declaration does not be itself establish the fact of a possessory title to entitle a person basing his claim thereon to a declaration of title; it is not a document of title. (See *Bright v. Roberts, (1964-66) ALR (SL) 156).*

In ***Sorie Tarawlli vs. Sorie Koroma S.C.Civ. App. 7/2004 (unreported) Renner-Thomas, CJ*** delivering the Judgment of the Supreme Court has this to say on possessory title:

> *"A Plaintiff who relies on the fact of possession by himself or his predecessor-in-title must prove more than just mere possession. It is true that proof that a claimant was in possession before the Defendant is prima facie evidence of his having a better title than*

the defendant and that such prior possession raises a presumption that the claimant is seised in fee."

In the instant case, apart from the Statutory Declaration admitted in evidence the Appellants did not adduce any independent evidence to show that he and those through whom he claims have extinguished the title of the true owner or that they have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim.

The authorities are clear that a Statutory Declaration is not a document of title, but merely an attempt to record evidence of how the owner came to claim title to a piece of land. It does not by itself establish the fact of possessory title to entitled a person basing his claim on that title to a declaration of title (See ***Bright vs. Roberts (1964-66) ALR (SL) 156)***.

In order for the document to be considered as showing a good root of title, the Declaration should have shown the history of ownership of the land for a period of at least Forty (40) years to satisfy the provisions of Section 1 of the Vendor and Purchaser Act 1874. There is no evidence that the Appellant's father had been in possession of the land for at least 40 years. This principle was clearly stated by North J, in ***Re Cox & Neve's contract (1891) 2 CH. 109, 188:***

"And when I say a (40) years title, I mean a title deduced for (40) years, and for so much longer as it is necessary to go back in order to arrive at a point at which the title can properly commence. The title cannot commence in nubibus at the exact point to time which is presented by 365 days multiplied by (40). It must commence at or before the (40) years which it is agreed shall be a proper root of title."

I agree with the law as stated by the Learned Judge in the above case and I find that the very foundation on which the claim was made did not exist. Pa Sallu had no title to pass to the 1st Appellant. In my view the Statutory Declaration is worthless and cannot be relied upon to prove ownership of the said land.

Apart from the Declaration, there is no other evidence that the Appellant's father or indeed his predecessors-in-title, if he had any, had any land in the area in 1948 and 1949, save that the 1st Appellant testified that his father was on the property since the Burma War. No evidence was adduced to show how or from whom Pa Sallu acquired the fee simple title to the land on his return from the Burma War. In any case, this fact

was not even disclosed in the Statutory Declaration. On the evidence therefore, I fail to see how the Appellants can claim the land as fee simple owners from time immemorial. In my opinion the Statutory Declaration is worthless, and cannot be relied on to prove the 1st Appellant's ownership of the land he is claiming. The Appellants' claim to ownership of the land therefore fails. And I so hold.

I now proceed to examine the evidence regarding possession. The Respondents' claim in this action is based on title to land, in addition to a claim for trespass. It is trite law that a claim for trespass can also be grounded on possession, in other words, the claim to possession has to be considered to found a claim for trespass. The standard of proof in a claim based on title to land is higher than that required in a claim based on possession. See ***Henrietta Morgan & Others v. Margaret Leigh Civ. App. 2/75 (unreported) and Dunstan E. John & Reuben Macauley v. William Stafford; Alfred George Nathaniel Cole v John Eddie Taylor Supreme Court Civ. App. 1/75 (unreported).***

In the case of Dunstan E. John & another v. William Stafford & Others, Betts JSC said at page 12 of the Judgment:

> *"In a claim for trespass the Plaintiff need not prove title as stated in the case of Goslyn v. Williams (1720) Fortes 378. Possession alone is indeed sufficient to sue in trespass as against a wrong-doer, but it must be clear and exclusive possession."*

I entirely agree with the above principle of law, and would adopt it in this instant case. The evidence before the lower Court revealed that the Respondents were in possession of the land at the time of the action was instituted in the Magistrates' Court for the eviction of Fayama Koroma the Respondents' caretaker. There is evidence that at the time of the action was taken in the High Court by the Respondents, the 1st Appellant was in possession having evicted the Respondents' caretaker from the land, but in my view such possession was not clear and exclusive possession. In a case for trespass all the Plaintiff has to prove is a better right to possession than the defendant and such possession must be clear and exclusive.

One way of proving this is to show that he has a better title to the land. In this case, though the evidence adduced by the Appellants may not be sufficient to entitle him to a declaration of title, there is, as I have pointed out above, some evidence that he was in possession of the disputed property. The 1st Appellant in the court below gave evidence that as far back as 1988, his father and members of his father were in possession of

the land in question. He said, in addition, that his father was using the land to grow crops etc and had a structure on the land. He did not tell the Court what type of structure was on the land. According to Counsel, Mr. Shears-Moses, *'the Appellant must have had some kind of structure on the land though not the kind that he found on the land on his return from his studies'*. This evidence is rather very vague and unclear.

From the evidence, it is my view that the Appellants' did not have exclusive possession of the property in dispute. The fact that the parties had to go before Bambay Kamara in 1988 to seek a compromise shows that some adverse claim was made against his father's occupation and/or ownership of the property and therefore his possession of the land in dispute could not have been 'clear and exclusive". He cannot therefore depose that no adverse claim was ever made against his father's ownership of the land in dispute.

In the light of the foregoing, I hold that the appeal is without merit as it is lacking in substance, and that the Respondents are the true owners of the property known as No 10 Regent Road Wilberforce Freetown, they having proved their claim to the title on the strength of their titles recited in Exhibits "A1" "B" and "C1". They are in my Judgment therefore entitled to the declaration of title they sought.

I will therefore set aside the Judgment of the High Court and enter Judgment for the Respondents with regard to the claim for a declaration of title sought. I will also allow the claim as regards trespass by the Appellants on the land in dispute and order damages for trespass against them.

In the circumstances, I make the following Orders:

1. The Appellants' Appeal herein is hereby dismissed.

2. The Judgment of the High Court is hereby set aside and Judgment is entered for the Respondents.

3. The 1st Appellant's Statutory Declaration sworn to on 29th December 2003 and registered as No. 96 at Page 78 in Volume 81 of the Books of Statutory Declarations in the Office of the Registrar-General for Sierra Leone in Freetown is hereby cancelled and is to be expunged from the Books of Statutory Declarations.

4. The Respondents are hereby awarded damages for trespass such damages to be assessed by the High Court.

5. The Respondents are awarded the cost of this appeal and of the Court below such costs to be taxed.

S. Bash-Taqi, JSC

I Agree.....
Hon Mr. Justice P. O. Hamilton, JSC

I Agree.....
Hon. Mrs. Justice V. A. D. Wright, JSC

I Agree.....
Hon. Mr. Justice M. E. Tolla Thompson, JSC

I Agree.....
Hon. Mr. Justice N. C. Browne-Marke, JA