**BEATRICE ANTHONY (MRS)**

**V.**

**OBI ONYEBASHI AND OTHERS**

SUPREME COURT OF NIGERIA

7TH DAY OF NOVEMBER, 1974

SUIT NO. SC 144/1973

**LEX (1974) - SC. 144/1973**

OTHER CITATIONS

2PLR/1974/12 (SC)

BEFORE THEIR LORDSHIPS

TASLIM ELIAS, C.J.N.

SODEINDE SOWEMIMO, J.S.C.

DAN IBEKWE, J.S.C.

**BETWEEN**

BEATRICE ANTHONY (MRS)

AND

1. OBI ONYEBASHI

2. OBI OKOLO ANYAMELUSHO

3. OBI UTOMI ONI ANWA

4. OBI AWOLO

5. OMO NGBUSHIE OKOLIE

**ORIGINATING COURT(S)**

HIGH COURT OF BENDEL STATE HOLDEN ASABA (Ekeruche, J., Presiding)

**REPRESENTATION**

F. R. A. WILLIAMS with J.C. ANYADUBA - for the Appellants.

CHIKE OFODILE for the Respondents.

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW - LAND:-Action for damages for trespass - Interim Injunction - Trial judge requiring plaintiff to prove nature of grant – Necessity

REAL ESTATE AND PROPERTY LAW - LAND:- Claim for injunction restraining defendants from building on land and damages for trespass – Whether requires proof of nature of claimant’s right in the land with sufficient precision

REAL ESTATE AND PROPERTY LAW - LAND:- Land allocation by family head to a female member of the family for use under customary tenure - Burden of proof on grantee in claim for injunction and trespass instead of declaration of title

CUSTOMARY LAW:- Grant of land under Asaba customary law to female member of family – How proved – Whether daughter of grantee can succeed to the interest of mother-grantee in the land

CHILDREN AND WOMEN LAW:- *Women and Real Estate/Land – Women and Inheritance -* Grant of land to an acknowledged female member of a family by family head – Right of daughter of said female member to inherit the land on her demise – Attempt of family to frustrate the inheritance – Attitude of court thereto

**MAIN JUDGMENT**

**ELIAS, C.J.N**. (DELIVERING THE JUDGMENT OF THE COURT):

In Suit No. A/31/65 Ekeruche, J., gave judgment in the High Court, Asaba, against the plaintiff (herein appellant) in the action which she had brought against Obi Onyebashi and four others as defendants (herein respondents) for damages for trespass and for an interim injunction to restrain the defendants, their servants or agents from further erecting a concrete building on a piece or parcel of land, Umuagu Asaba, situate along Benin/Asaba Road.

The plaintiff is the daughter of one Madam Anuchi ObiOdilli (deceased) who was a daughter of the Umudasiafor family of Asaba who were the defendants in the court below, the 1st to the 5th defendants representing the family in the suit. The relevant paragraphs of her Statement of Claim aver as follows:

“1. Plaintiff is one of the successors to the estate of late Madam Anuchi ObiOdilli who died interstate in 1962 possessed of a piece or parcel of land in dispute situate at Nnebisi Road at Asaba.

3. The land in dispute was granted to the plaintiff’s late mother Madam Anuchi ObiOdilli, “absolutely in” 1952. Plaintiff and her predecessor in title have been in continuous possession of the land in dispute ever since.

4. On the death of the plaintiff’s mother, the plaintiff together with other members of the family succeeded to the land in question as communal property.

5. The defendants are the members of the Umudasiafor family and Trustees of the family land, and are sued for themselves and on behalf of their family.

9. The land in dispute is more clearly delineated and defined as per approve survey plan No. PO/MW.2/65 filed with this Statement of Claim.

11. On or about the month of June, 1965, the plaintiff surveyed the land and prepared a building Plan which was made in the name of their late mother as a memorial, which plan was approved by Asaba Urban County Council preparatory to putting up a building on the land in dispute. Asaba Urban County Council’s plan No. ATPA.65/B/31 of 23/7/65 will be founded upon.

12. The plaintiff thereafter molded about 5,000 cement blocks on the land preparatory to putting up a building on the land.

13. The defendants, seeing what was happening, rushed on the land on the 17th September, 1965 and started to disturb the plaintiff’s workers.

14. The plaintiff reported the matter to Police, and on arrival of the Police, the defendants attacked the Police, tore some Police Uniforms and generally rioted, after which some of them were arrested.

15. The defendants have physically entered on the land, and began to make foundation for building without an approved building plan.

16. WHEREFORE plaintiff claims from the defendants, jointly and severally:

(a) ₤200 damages for trespass;

(b) Injunction to restrain the defendants, their servants, agents from further acts of trespass.”

The plaintiff later gave evidence in support of her averments, including the ceremony of the grant of the land (measuring 50 feet by 170 feet) at the residence of the family head. She said that her mother and herself farmed on the land until her mother’s death in 1962, before which the mother had made a plan for a building on the land (ex. 2); that in 1965, she molded 5,030 brick blocks with which she had intended to erect a building on the land but which the defendants used in making a foundation on the land and she tendered ex. 1 through her surveyor as the plan of the land in dispute; that, when she went on the land on September 17, 1965, the defendants forcibly drove her out of the land; and that the matter was later reported to the police who arrested them. The defendants, through the 1st defendant as spokesman, denied the existence of any grant of land by the family to the plaintiff’s mother. The defendants admitted having driven the plaintiff off the land.

After reviewing the evidence adduced before him by both sides, the learned trial Judge dismissed plaintiff’s claim, observing:

“Unfortunately, as I have said earlier:

(1) the plaintiff has not established the area of land granted her mother to be the area shown verged pink on her plan and

(2) she has not proved the Corporeal Quantum of the grant and she has accordingly not established that she has any right or interest in or over the area shown verged pink on Exhibit 1, said to be the land in dispute. By her case she concedes the radical title in the said land in Umudasiafor family and so also original possession. She has not established that Umudasiafor family parted with their possession of the land to her mother not to talk of the title therein.”

Against this decision the plaintiff brought this appeal on seven grounds which learned counsel for the appellant argued together under two main heads. He submitted that the learned trial Judge was wrong in having dismissed appellant’s claim on the grounds (a) that she had failed to prove the identity of the land in dispute, and (b) that she had not established the “corporeal quantum” of the land. It is fair to point out that the learned trial Judge himself held that there was grant of some land to the appellant’s mother, as when he said:

“Having considered the entire evidence on the question whether or not a grant of some land was made to the plaintiff’s mother, I am satisfied and I accept and believe the plaintiff’s evidence and that of her witnesses on the point, that the Umudasiafor family granted the plaintiff’s mother some land at Aniabor. I believe the plaintiff’s evidence that her mother took to the Umudasiafor family meeting in the house of the head of the family, the gifts which she said her mother took there. I accept and believe her evidence and the evidence of her witnesses that her mother gave the things to the family and that the family accepted and shared the gifts and that the family deputed persons amongst whom were Utomi Onianwa and Obi Awolo to go and allot land to her mother at Aniabor.

I am satisfied that the said persons and other members of Umudasiafor family went together with the plaintiff’s mother to Aniabor land and that the persons deputed by the family allotted some land to the plaintiff’s mother in Aniabor.

That much is clearly established by evidence before me.”

After having so held, the learned trial Judge posed the issues which he regarded as crucial thus:

Having found that there was a grant by Umudasiafor family of some land to the plaintiff’s mother Madam Anuchi Obi Odilli, is the plaintiff entitled to succeed on her claim? Whether she is entitled to succeed depends on (a) whether she has proved the corporeal quantum of the grant, and the nature of the grant.

The fact, however, is that as learned counsel for the Appellant argued, the area of land was not in dispute, as both sides admitted by their pleadings: see paragraph 9 of the Statement of Claim which refers to the plan, and this was admitted in paragraph 8 of the Statement of Defence: also, the evidence of the sole witness for the defence that he “knows the land in dispute”.

With regard to the learned trial Judge’s requirement that the appellant should establish the “corporeal quantum”, we agree with the learned counsel for the appellant’s complaint about this strange expression. We think that by this term was meant no more than ‘The nature of the grant” which the learned trial Judge juxtaposed to “corporeal quantum of the grant”. If the appellant were claiming a declaration of title to the land in question, there might be some substance in the learned trial Judge’s complaint that she had not described the nature of her mother’s right in the land with sufficient precision. But that is not the case here, where an allocation had been made by the family head to a female member of the family, obviously for use under customary tenure of which the normal incident is that it is used either for farming or for residential purpose. What else would the appellant’s mother as the allottee of family land have been required to prove, had she been alive? What more could the appellant, her daughter, be lawfully expected to establish as to the nature of the grant she inherited from her mother?

Indeed, on this point, the learned trial Judge held as follows:

“It now remains for me, as between the plaintiff and Umudasiafor family, to advert to a point taken by defendants’ counsel which is that plaintiff has not shown that she lawfully succeeded to the land in dispute on the death of her mother. That point in my view is without substance. Once it is established that there was a grant to the plaintiff’s mother of the land in dispute, that in fact would mean that Umudasiafor family have divested themselves by that grant of whatever interest in the land the grant transferred to the plaintiff’s mother, and if the plaintiff had shown what that interest was and the area affected, and also shown that she was in possession of the land following her mother’s death by virtue of the grant made to her mother, as between her and the Umudasiafor family she would have a superior claim to such interest, and if that interest was a possessory title to the land granted, carrying with it the right to possess the land, certainly, she could have successfully maintained an action against the Umudasiafor family for trespass.”

We agree with learned counsel for the appellant that having found that there had been a grant to the deceased mother, he should have given judgment for the appellant.

Where, as in the present case, the appellant is not seeking a declaration of title but only injunction, the respondents have no right to disturb her possession until she is proved to have committed forfeiture according to the well known principles of our customary land law. As Verity, C.J., once observed in Emegwara & Ors. v. Nwaino & Ors. (1953) 14 W.A.C.A. 347, At pp. 3478:

Although there is some difference of view as to the description of the land and its identification by name, there is no doubt upon the evidence that the respondents, who were the plaintiffs in this action are entitled to exclusive and undisturbed possession of a certain area of land delineated in a plan exhibited in evidence (exhibit ‘C’) and therein described as ‘Okpulo’. It is equally beyond doubt that the respondents were so entitled on the date of the alleged trespass and that the appellants wrongfully entered thereupon, removed pillars erected as boundary marks in pursuance of certain arbitration proceedings so long ago as 1928 and committed other acts of trespass.

Unless and until the appellants by lawful process succeed in establishing that the respondents have forfeited their right of occupation it is clear also that the appellants should be restrained from further trespass.”

Mr. Ofodile, learned counsel for the respondents, replied that there had never been a grant of land to the appellant’s mother, a position he had taken in the lower court. The learned trial Judge’s own specific finding to the contrary is sufficient answer to this argument. Although he was right to insist that the trial Judge only referred to some land having been granted at Aniabor to the appellant’s mother, it was nevertheless the duty of the Judge to identify the land so granted. It was agreed by learned counsel that, even though there was no plan, area granted in that part were normally demarcated with trees planted by the family. Learned counsel also agreed that the land being claimed by the appellant is that described in plan PO/MW.2/65 which was made on October 26, 1965, that is Exhibit 1, and that there was no dispute about the land in this suit. We are clearly of the view that, instead of dealing squarely with the issues before him, the learned trial Judge misdirected himself into a consideration of questions more germane to a claimant as customary tenant or even as a purchaser of the land than to someone who is only claiming in right of her mother who was accepted by all to be a member of the defendant’s family.

It is significant to note the following closing remarks of the learned trial Judge with respect to the position of the appellant in this case:

“As regards the issue of costs, I must say that it is with the greatest reluctance that I am going to award costs to the Umudasiafor side in this case. The reason being that they have treated the plaintiff very unfairly. Normally, their stand in the whole case has no merit. It is in my view reprehensible. They have, however, so to say, won and they will get some costs.”

We will accordingly allow the appeal. The judgment of Ekeruche, J., in Suit No. A/31/65 delivered on December 16, 1971, including the order as to costs, is hereby set aside. Judgment is hereby entered for the plaintiff. Damages assessed at N300 are awarded for trespass and an injunction is granted to her against the defendants in respect of the land in dispute. We also order that the 6th defendant do pay N60 costs to the appellant for his joinder in the Asaba High Court which unnecessarily increased the appellants costs of litigation.

We assess costs in the court below at N50 and at N165 in this Court to be paid by the 1st to 5th respondents to the appellant. And this shall be the judgment of the Court.

Appeal allowed.