**KAREEM AND OTHERS**

**V.**

**OGUNDE AND ANOTHER**

SUPREME COURT OF NIGEIRA

28TH DAY OF JANUARY, 1972

SUIT NO. SC 341/1969.

**LEX (1972) - SC 341/1969**

OTHER CITATIONS

2PLR/1972/77 (SC)

(1972) 1 S.C. 126

(1972) All N.L.R 75

**BEFORE THEIR LORDSHIPS:**

COKER, J.S.C.

UDOMA, J.S.C.

FATAI-WILLIAMS, J.S.C.

**BETWEEN:**

1. MRS. S.A. KAREEM

2. MRS. S.A. ALAFIA

3. MR. BAYO VAUGHAN

the (Beneficiaries of the late Madam Nimota Ajike) – Appellants

AND

1. DAVID O OGUNDE

2. MICHAEL O. ODUNEYE – Respondents

**ORIGIINATING COURT**

HIGH COURT, LAGOS (Kassim, J., Presiding)

**REPRESENTATION**

J. A COLE for Appellants

B. F. ADEEKO for Respondents.

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

REAL ESTATE AND PROPERTY LAW – LAND:– Claim of title to Land – Ways of proving title - Trespass - Whether registration automatically vests title in a person under the Registration of Titles Act - Whether Register of Titles should be rectified

CUSTOMARY LAW:- Customary law title to land - How proved

CHILDREN AND WOMEN LAW: Women and Real Estate – Women and customary law - whether parties can lay claim to land which belonged to their mother who died intestate under customary law

**MAIN JUDGMENT**

**COKER, J.S.C.** (DELIVERING THE JUDGMENT OF THE COURT):

The appellants were the plaintiffs in this action instituted in the High Court, Lagos. The action was tried by Kassim, J. who delivered judgment therein on the 26th May, 1969. The plaintiffs’ writ was endorsed for the following claims:

“(a) Declaration that plaintiffs are entitled in fee simple absolute in possession to the piece or parcel of land situate lying and being at Folarin Street, Surulere and otherwise described in the Deed of Conveyance dated the 11th day of November 1955 and registered as No. 29 at page 29 in Volume 975 in the Register of Deeds kept at the Lands Registry in the office at Lagos.

(b) Rectification accordingly of the Register of Title No. MO. 3413 entered in the names of the defendants: David Ogunbayo Ogunde and Michael Adepoju Odeneye at the Lands Registry in the office at Lagos.

(c) £500:0:0d damages for trespass committed by the defendants entering into the said land and damaging the fence of the plaintiffs thereon.

(d) An injunction restraining the defendants, their servants or agents from trespassing on the said land.”

Pleadings were filed by the parties and the pleadings show clearly that the plaintiffs, as well as the defendants (now respondents) were putting their respective titles in issue. The land concerned is situated at Folarin Street, Surulere in the Mainland of Lagos. By their pleadings, the plaintiffs aver that they are the children of one Madam Nimota Ajike (now deceased), that by virtue of the death intestate of their late mother in 1955 they became owners of the land in accordance with the customary laws of the Yorubas in Lagos, that their deceased mother held a conveyance covering the land in dispute, that her predecessor-in-title also had conveyances of the land and that the plaintiffs were in peaceful possession of the land until March, 1966 when the defendants broke and entered into the said land after getting themselves registered as proprietors of the freehold interest in the land in accordance with the provisions of the Registration of Titles Act, under Title No. MO.3413. The statement of defence denies virtually all the facts averred in the statement of claim and states that the defendants claimed title to the said land, that the first defendant had erected a building costing some £2,000 on part of the land. They also pleaded long possession and the equitable defences of laches, acquiescence, standing-by and so on.

At the trial, the parties gave evidence in support of their respective pleadings. For the plaintiffs the following instruments or conveyances were produced in evidence:

(1) A conveyance dated the 11th November, 1953 from one Adam Idris Animashawun to Madam Nimota Ajike, Exhibit “A”. The conveyance, Exhibit “A”, recites an earlier conveyance of the 13th February, 1942.

(2) A conveyance dated the 13th February, 1942 from Adam Adds Animashawun and one Alhaji Ayinla Balogun to Emmanuel Ajayi Roberts, Exhibit “B”. This Instrument describes how Adam Idris Animashawun exchanged this land for another one belonging to Alhaji Ayinla Balogun and how the latter then sold the land to Emmanuel Ajayi Roberts.

The conveyance Exhibit “B” recites, inter alia, that the property was purchased by Animashawun at an execution sale in 1934 but states nothing as to the origin of the title of the judgment debtor therein described. As the root of title claimed by the plaintiffs went no farther, it is clear that they could not succeed in a claim for a declaration of title. (See Coker v Animashawun (1960) L.L.R. 71).

As far as the defendants are concerned, they claimed by their pleadings and gave it in evidence that the land in dispute was a portion of lands originally belonging to the Oloto Chieftaincy Family and that that Family had at one time granted the land in dispute to one Lawani Giwa (now deceased). The defendants also claimed that one Ebenezer Anjorin bought the land in dispute from the children of Lawani Glwa and obtained from them a conveyance which they produced in evidence as Exhibit “G”. They then claimed that by virtue of a conveyance also produced in evidence as Exhibit “F”, the said Ebenezer Anjorin sold and conveyed the land to the defendants. The two defendants, so they said, then proceeded to get themselves registered under the provisions of the Registration of Titles Act, cap. 181 as proprietors of the freehold estate in the land. This was done and they were in due course awarded a Land Certificate dated the 17th June, 1964 and produced in evidence as Exhibit “H”. The defendants further stated in evidence that they later discovered that the land formed part of the Oloto Chieftaincy Family lands and so approached that family and paid them for the land and as a result of this they obtained the conveyance dated the 1st June, 1967 and put in evidence as Exhibit “M”. They then got the Land Certificate Exhibit “H” duly amended by endorsing it with the record of Exhibit “M”.

It is manifest that both by their pleadings and the evidence which they gave in court the defendants acknowledged the radical title of the Oloto Chieftaincy Family to the land. At the time when they got themselves registered as the owners of the freehold interest in virtue of Exhibit “H”, their title did not derive from that Family and indeed until the action went to court on the 8th October, 1966 they had no title traceable to the Oloto Chieftaincy Family. They rested their case on the conveyance to themselves by the children of Lawani Glwa who also gave evidence on their behalf. The evidence of the Chief Oloto himself (who testified for the defence) completely destroyed the evidence of the descendants of Lawani Glwa and indeed completed the destruction of Lawani Giwa’s title already frozen by the decision of Nicol, C.J. in Chief Esugbayi Oloto v. Dawuda AND OTHERS. given on the 26th September, 1904 (Exhibit “O” in these proceedings) and confirmed by the majority decision of the Full Court on appeal in the same case (see Chief Esugbayl Oloto v. Dawuda AND OTHERS. (1904) 1 N.L.R. 57). There can be no doubt therefore that when the action was commenced against them, the defendants had no title derived from the Oloto Family and to that extent their title as well was defective. Now, section 53(1) of the Registration of Titles Act, cap. 181 provides as follows:

“53(1) Registration of any person as owner of any land, lease, or charge consequent on a forged disposition or any disposition which if unregistered, would be absolutely void confers no estate on such registered owner, but he shall, in the event of the register being rectified to his prejudice on that account and claiming in good faith under a forged disposition be entitled to recover compensation from the Government.”

On the face of these provisions it is evident that in the battle of titles between the parties the Land Certificate Exhibit “H”, which is a first registration, could not avail the defendants as against a better title.

It is true that the defendants in 1967 obtained the conveyance (or ratification) Exhibit “M„ from the Oloto Chieftaincy Family. The conveyance Exhibit “M” recites, inter alia, that the defendants had bought the land from the Oloto Chieftaincy Family as far back as the 11th July, 1964. The receipt given to them and dated the 11th July, 1964 was produced in evidence as Exhibit “L”; but surely at that date and indeed from the 17th June, 1964 (as per the Land Certificate Exhibit “H”) the defendants had been registered as owners of the land. It is inconceivable that without telling the Chief Oloto then that they were already registered as the owners of the land they would then approach the Chief Oloto, divest themselves of the ownership which by virtue of Exhibit “H” they had purported to acquire and then repurchase the land from that Family. Be that as it may, at the time when the action was commenced the title of the defendants was clearly bogus.

Both parties had claimed to be in possession of the land and in such a case the law ascribes possession to the party with title or with a better title. The learned trial Judge found positively in favour of the plaintiffs for possession because in the course of his judgment he observed as follows:

‘There is abundant evidence that the land was in plaintiff’s possession when the defendants bought it in 1963, and there is no doubt that they were not noted of the defendants’ intention to register it in their names; nor has it been proved that the Registrar ordered that they should not be notified.”

As the title of the defendants is also defective they could not oust the plaintiffs from the land. See Alhali Fasasi Adesheye v. J. O. Shiwoniku (1952) 14 W.A.C.A. 86, where at p.87 the following statement of the law appears:

‘The appellant sought to defeat the respondent’s claim by setting up the Conveyance dated 14th January, 1950, under which he claimed to be the owner in fee simple of the land in dispute. The validity of that conveyance was put in issue by the respondent, and, in my opinion, the learned trial Judge was bound to determine the issue so raised. Once it became clear that the grantors had purported, as they did, to convey a title which they did not possess, the respondent being in possession of the land could successfully maintain an action for trespass against the appellant.”

We are clearly of the view therefore that the plaintiffs’ claims for damages for trespass and injunction should have been upheld. The learned trial Judge had found that the defendants were in trespass when they entered upon the land in dispute but he then proceeded to non-suit the plaintiffs on those claims. He did not, as he should have done, assess the amount of damages payable in case he was found to be in error by the Court of Appeal. We must here repeat the advice which we had given on a number of occasions that In cases involving the assessment of damages it is the duty of a trial court or tribunal to assess the damages proved and payable even K that court had decided that the entitlement of the claimant thereto had not been proved. This course obviates the necessity of sending back a case where no other course is justifiable merely for the purpose of assessing such damages and unduly mulcting the litigants in the expenses of unnecessary retrials. In the case In hand the plaintiffs gave evidence of damage to their sign-board (£2.5/-) six palm trees (£8) and their fence (£15). These make a total of £25. 5/-. The evidence was unchallenged and in any case, as general damages for trespass they would not have been entitled to anything more than nominal damages. We think that the damages to which the plaintiffs are entitled should be fixed at a figure of £40.

The plaintiffs have asked for rectification of the Register of Titles in their favour. The learned trial Judge found, and we think he was correct, that in view of the evidence before him the plaintiffs were entitled, ex virtute justiciae, to have the register rectified. The plaintiffs were not served, as they should have been, with the necessary notices prescribed by section 8 of the Registration of Titles Act, cap. 181 and indeed that much was admitted in evidence at the trial. For this reason alone the defendants’ registration is adversely affected and certainly is of no avail against the plaintiffs and should have been at their instance set aside and the register rectified accordingly. The plaintiffs have not stated what rectification they desire and in the circumstances we would concern ourselves only with asking that the names of the defendants be expunged from the register in respect of the property in dispute.

Finally, and this was the issue primarily decided by the learned trial Judge, it was held against the plaintiffs that they were not competent to bring this action. The plea was raised in the statement of defence and in the judgment of the learned trial Judge it was upheld to the effect that the plaintiffs had failed to prove the native law and custom by which, as Yorubas of Lagos and descendants of Madam Nimota Ajike, they were entitled to succeed to the estate or property of their deceased mother on her death intestate. The learned trial Judge having held that native law and custom was a matter of evidence and that the plaintiffs had failed to show by the evidence that they succeeded to the property of their mother, who had died intestate in Lagos, observed as follows in his judgment:

‘This failure of the plaintiffs to prove that they are competent to bring this action is fatal to their case and they must fail on all counts.”

With respect, this is a mistaken view of the law. Section 14 of the Evidence Act, cap. 62 provides as follows:

“14(1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.

(2) A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the person or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

(3) Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the allowed custom as binding upon them: Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law it it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.”

From this it is obvious that a custom or customary law could be proved or sustained if it is shown by facts given in evidence or judicially noticed. The Law Reports are replete with cases which establish firmly the entitlement of a Yoruba person’s children to succeed in Lagos to his property on his death intestate and the locus classicus in the case of Lewis v. Bankole (1908) 1 N.L.R. 81, where at p. 105 Osborne, C.J. observed as follows:

‘The first claim of the plaintiffs was for a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to their family compound................... Though I am unable to make a declaration in the exact terms asked by the plaintiffs in the first part of their claim, I have endeavoured above to indicate what I consider to be the rights given by customary native law to the plaintiffs, as members of the family with respect to the family compound, which I declare to be the property of the family of Mabinuori deceased.”

See also Miller Bros. v Abudu Ayeni, etc. (1924) 5 N.L.R. 42 (Van Der Meulen, J.); Caulcrick v Elizabeth Harding AND Anor. (1926) 7 N.L.R. 48 (Tew, J.). Catherine Mary Sogunro Davies v. Disu Sogunro AND OTHERS. (1929) 9 N.L.R. 79 (Berkeley, J.) Ebun Ogunmefun v. Oluremi Ogunmefun AND OTHERS. (1931) 10 N.L.R. 82 (Webber, J.). The evidence given by the plaintiffs in this case was more than sufficient to support their claim to entitlement and the learned trial Judge was wrong to have ruled against them on this point.

In all the circumstances of the case, therefore, the appeal must be and it is hereby allowed. The judgment of Kassim, J. in Lagos High Court Suit No. LD/603/66, including the order for costs, is set aside and we make the following orders:

(i) The plaintiffs’ claim for declaration of title is dismissed.

(ii) Judgment is entered in favour of the plaintiffs for:

(a) rectification of the Register of Titles No. MO.3413 by excising therefrom the names of the defendants or otherwise cancelling the said register insofar as the names of the defendants appear thereon;

(b) £40 damages for trespass against the defendants jointly and severally; (c) a perpetual injunction restraining the defendants their servants or agents from trespassing on the said land.

(iii) The foregoing shall be the judgment of the Court.

(iv) The defendants will pay the costs of the plaintiffs fixed in the High Court at 105 guineas and in this Court at 64 guineas.

Appeal dismissed.