**OKOYE OYIDIOBU**

**V.**

**SARAH OKECHUKWU**

SUPREME COURT OF NIGERIA

12TH DAY OF MAY, 1972

SUIT NO. SC. 265/66

**LEX (1972) - SC. 265/66**

OTHER CITATIONS

2PLR/1972/135 (SC)

(1972) 5 S.C. (REPRINT) 123

**BEFORE THEIR LORDSHIPS:**

TASLIM ELIAS, C.J.N.

ATANDA FATAI-WILLIAMS, J.S.C.

SODEINDE SOWEMIMO, J.S.C.

**BETWEEN**

OKOYE OYIDIOBU – Appellant

AND

SARAH OKECHUKWU – Respondent

**ORIGINATING COURT**

HIGH COURT, ONITSHA (H. U. Kaine, J., Presiding)

**REPRESENTATION**

H. J. WHYTE for Appellant

G. R. I. EGONU for Respondent.

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

TORT AND PERSONAL INJURY LAW:– Nuisance – Definition of kola tenancy – Blockage of Plaintiff’s access way – Claim for damages for nuisance

REAL ESTATE/LAND LAW:- Tenancy and Claim founded on nuisance – Kola Tenancy – Nature and legal character

CHILDREN AND WOMEN LAW: Women/Widows and Real Estate/Land – Women and Justice Administration - Protection of access way to property – Claim of woman and her husband (who died during pendency of suit) for damages caused by attempt to obstruct access way to their property – How treated

**MAIN JUDGMENT**

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

This is an appeal from the judgment of H. U. Kaine, J., at the High Court, Onitsha, delivered on May 11, 1964, in which the plaintiff’s claim was for the sum of £100 being damages caused by the defendant by obstructing the plaintiffs access way, an injunction to restrain the defendant, his servants and agents from building on the said access way and also an order of the Court for the defendant to remove the foundation of his proposed building from the access way.

The learned trial Judge found that the action had been brought by the plaintiff and her husband, that the husband died while the action was pending, and that it was grounded in nuisance. He also found that the plaintiff’s complaint was that the land over which they had had an access way for the past thirty-five years was bought and paid for outright from the Mgbelekeke family and that it had just been occupied by the defendant who had thereby blocked the access way. The learned trial Judge found that the defendant’s contention was that there was no access way on the land in question, that the only access way that was granted not to the plaintiff but to her husband by the Mgbelekeke family under the Onitsha kola tenancy was on the eastern side of the property of the surviving plaintiff, who, as a mere licensee, could not maintain an action for an easement of way of necessity against the defendant who was a tenant. With regard to the nature of the interest which the plaintiff had in her property, No.25 Pampam Lane, the learned trial Judge believed the plaintiffs claim that it was she who paid for it, since she had been joined as original co-plaintiff before her husband’s death and the witness who made Exhibit B for her said in evidence that he received his instructions from her and that it was she who told him to write down her husband’s name on the plan. The learned trial Judge said further.

“I have to say that I believe that the plaintiff and her husband were kola tenants of the Mgbelekeke family and as such they are owners in possession of the property which they can pass to their children and to their children’s children but that whenever they want to assign their Interest to a stranger, they have to pay kola to Mgbelekeke family. I do not believe that they were tenants from year to year...”

This brief description of the characteristics of a kola tenancy the learned counsel sought to attack as inadequate, but we consider that the learned trial Judge did not claim that it was an exhaustive definition, any more than one can claim the same for this definition in s.2 of The Kola Tenancies Law (Cap. 69 of the Laws of Eastern Nigeria, 1963):

“Kola tenancy’ and ‘tenancy’ mean a right to the use and occupation of any land which is enjoyed by any person in virtue of a kola or other token payment made by such person or any predecessor in title or in virtue of a grant for which no payment In money and in kind was exacted.

For an appreciation of the other elements of a kola tenancy one must look at the other provisions of this Law, for example sections 10 and 12 which deals with assessment of purchase price and of compensation as Involving the ‘Value of any rents or other advantages which the tenant may derive from the grants made by him or his predecessors in title of interests in the land to other persons”.

The learned trial Judge was, therefore, right in thus holding that the plaintiff had sufficient interest in the land to sue an action in nuisance:

“In short I have to say that I agree with Mr. Egonu that the plaintiff can maintain this action which is grounded in nuisance against the defendant for obstructing her access way and I find as a fact that the building did block her access way and that the passage she is now using is part of her neighbour’s land.”

The plaintiff’s further claim that the defendant’s building, if completed, would obstruct her right to light and air was, in our view, rightly rejected by the learned trial Judge. The learned counsel for the defendant, Mr. Whyte, had in the court below based his contention mainly on the ground of a claim to an easement of way of necessity, arguing at length the characteristics of an easement, and by whom and how it can be acquired. Indeed, his five ground of appeal were stated as follows:

“1. Error in Law and Misdirection:

The learned Trial Judge erred in law and misdirected himself in law in holding that ‘the plaintiff can maintain this action which is grounded in nuisance against the defendant for obstructing her access way’ without considering whether the plaintiff has actually acquired an easement over the same ‘access way’.

2. Error in Law:

That the learned Trial Judge erred in law in not considering that the defendant is not an owner in fee simple absolute in possession of the Servient tenement but a yearly tenant and that therefore his tenement is not subject to the easement claimed.

3. Error in Law:

That the learned Trial Judge erred in law in not considering that the plaintiff is not an owner in fee simple absolute in possession of the dominant tenement, 25 Pam Pam Lane, Onitsha, so as to entitle her to the easement claimed.

4. Error in Law:

That the learned Trial Judge erred in law by admitting oral evidence to vary the content of a document Exhibit ‘B’, contrary to law whereby he held that the plaintiff is the owner of 25 Pampam Lane, Onitsha

5. The judgment is against weight of evidence.”

The learned counsel later abandoned ground 5.

The learned counsel for the plaintiff, while having been careful to insist throughout that his client’s case was founded in nuisance, quite unnecessarily permitted himself to be diverted into an attempt to prove that the plaintiff could claim a right to an easement because “even a mere lessee can enjoy an easement granted to the dominant tenement” and he also contended that ‘the plaintiff had an easement of necessity on the land which the Mgbelekeke people retained...”

It is to be noted that, in arguing this appeal before us, Mr. Egonu, learned counsel for the respondent, wisely refrained from repeating this line of argument, despite Mr. Whyte, the learned counsel for the appellant’s strenuous efforts to argue on the ground that the respondent had no right to an easement of way of necessity.

Of direct relevance to the respondent’s case, however, is this careful statement of his findings by the learned trial Judge:

“I have to say that I am satisfied from the evidence before me that the plaintiff has been in occupation of the land for about 35 years and has been using the land now in dispute as her access way of Pampam Lane. The plan Exhibit ‘H’ which Mr. Ononye said was approved by Mgbelekeke family did not show any access way on the eastern side of the property. The only access way shown there for the property is on the western side that is on the land now in dispute.

Also the building plan Exhibit ’B’ describes the land in dispute as a foot path and although it was the plaintiff’s building plan, it was tendered in evidence by the defendant and therefore It forms part of the defendant’s case so also is the plan Exhibit ‘H’ which was made as far back as 1939. Yesufu in his evidence also said that the plaintiffs house was facing the west and they have their access way there.”

We think that the respondent, even as an adjoining occupier, had suffered such special damage as to entitle her to sue the appellant for nuisance. As Lord Evershed, M. R. said in Trevett v. Lee (1955) 1 W.LR. 113 at p.116:

“Clay Lane was a highway, and it is axiomatic, as a general proposition, that a man who obstructs a highway commits, and is liable to be charged in respect of the commission of, a public nuisance. But that short statement is in truth somewhat of an over-simplification, for there is no doubt that not every obstruction of a highway constitutes a public nuisance. It is also well established that a private individual can only sue in respect of a public nuisance if he or she suffers some special damage as a result of it..:’

The same point was upheld in the recent case of Dymond v. Pearce AND OTHERS. (1972) 2 W.L.R. 633 when at p. 637, Sachs, LJ. held as follows:

‘The relevant law is compactly stated in the judgment of Lord Evershed, M.R. in Trevett v. Lee (1955) 1 W.L.R. 113,117 where he said:

The law as regards obstructions to highways is conveniently stated in a passage in Salmond on Torts, 11th ad., p.303: ‘A nuisance to a highway consists either in obstructing it or in rendering it dangerous,’ and then a number of examples are given which seem to me to show that, prima facie, at any rate, when you speak of an obstruction to a highway, you mean something which permanently or temporarily removes the whole or part of the highway from the public use altogether’.”

We would accordingly dismiss this appeal and we award costs to the respondent assessed at 84 guineas.

Appeal dismissed.