

In The Supreme Court of Nigeria

On Friday, the 21st day of April 1972

Before Their Lordships

Taslim Olawale Elias Chief Justice of Nigeria
Ian Lewis Justice, Supreme Court
Sir Udo Udoma Justice, Supreme Court

S.C. 75/70

Between

O. Ogunde Appellant

And

Oseni Ojomu Respondent

Judgement of the Court

Delivered by
Sir Udo Udoma. J.S.C

This is an appeal from the judgment of the High Court of Lagos in suit No LD/105/67 wherein the claim of the plaintiff, herein respondent, against the defendant, now appellant, was for £500 damages for trespass committed on his land situate in Aiyelero Street, at Iwaya, Yaba; and a perpetual injunction.

In his amended statement of claim filed and delivered in obedience to an order of court in that behalf, the plaintiff averred in effect and in so far as it is relevant to this appeal, that the land, the subject matter of the action and on which the defendant committed acts of trespass, was until he was let into possession thereof a portion of an area of land now known as Pedro village, originally granted absolutely as farm land to one Pachecco Pedro, alias Daddy Pedro, in 1861; that since the said grant, Pachecco Pedro and his family and descendants have been exercising undisturbed all rights of ownership in and over the whole of the land so granted, including the portion in dispute, until he was let into possession of the said portion; that in 1967 after he had commenced building therein the defendant, his servants and agents, without his leave or licence, broke and entered upon the said portion of land and therefrom dug up and removed his survey pillars and destroyed the structure already erected thereon by him, whereby he suffered damage.

The defendant in his statement of defence traversed generally the relevant averments contained in the plaintiff's statement of claim, and, particularly, alleged that the land in dispute "forms part of a large area of land which from time immemorial belongs under native law and custom to the Olotu Chieftaincy Family" who "have from time immemorial been in undisturbed and uninterrupted possession" thereof and have exercised all rights of ownership thereon' and that he became the owner in possession of the portion in dispute by reason of his acquisition of the same in fee simple, free from encumbrances from the Olotu Chieftaincy Family aforesaid in 1964 as evidenced by a conveyance in his favour dated 16th August, 1965, and registered as No 5 at page 5 in Volume 1245 at the Registry of Lands in Lagos. The defendant, however, admitted that "in December, 1966 the plaintiff entered on to the said land and the defendant sent him out of it" but averred further: "the defendant has remained in undisturbed possession of the said hereditament ever since."

On the pleadings, such as they were, it was clear that although the main claim of the plaintiff was grounded in trespass which is an action founded on possession, his claim to the ancillary relief of a perpetual injunction postulates the vital questions of title and puts the same in issue. Indeed, the

defendant based his right to the possession of the land in dispute on a deed of conveyance by virtue of which the land was granted to him by the Oloto Chieftaincy Family and thereby rooted his title in the Oloto Chieftaincy family.

In the course of the trial before Adefarasin, J., it emerged from the evidence called in support of the plaintiff's case, that the plaintiff himself was let into possession of the portion in dispute by the family of Pachecco Pedro and that Pachecco Pedro's root of title was also traceable to the Oloto Chieftaincy Family, the evidence being that the land in dispute originally formed a small portion of a large area of what used to be farmland in Iwaya, Yaba, originally granted by the Oloto Chieftaincy Family absolutely to Pachecco Pedro in or about 1861 and that since the said grant, different portions of the said land have from time to time been granted by Pachecco Pedro and his family to a number of other persons without any objection by the Oloto Chieftaincy family.

It was also common ground among leading members of the Oloto Chieftaincy family, some of whom testified for the plaintiff and some for the defendant, which is not uncommon in cases of this kind, that an area of land in Iwaya, Yaba, was in fact granted to Pachecco Pedro by the Oloto Chieftaincy Family. They, however, disagreed among themselves as to whether or not the particular portion in dispute was included in the area so granted. Thus, in essence, the dispute shifted from the plaintiff, as it were, who never in any case laid claim to the title to the land in dispute, to the family of Pachecco Pedro, the original grantees of the land. In short, it became a three-corner contest. **For the plaintiff to succeed therefore in his action of trespass and injunction the issue of title which looms large throughout the proceedings required to be investigated and ascertained first.** But the family of Pachecco Pedro were not directly a party to the suit although, like members of the Oloto Chieftaincy Family, some of them testified in favour of and supported the plaintiff's claim.

The learned trial Judge, after due hearing of relevant evidence and with the consent of both counsel and parties to the action, inspected the land in dispute in the presence of both parties, their counsel and their witnesses who gave evidence in the case during the trial. Thereafter, proceedings were resumed in court when both counsel addressed the court. The learned trial Judge then took time to consider his judgment in the case. He reviewed the evidence in the case in his judgment and came to the conclusion that the piece of land in dispute between the parties was in the possession of the plaintiff and that it was in his possession when the defendant together with other persons entered the land and demolished part of the structure which the plaintiff was trying to erect. He rejected the evidence given in favour of the defendant and consequently entered judgment for the plaintiff and awarded him the sum of £80 as general damages with costs. He, however, declined to decree the injunction sought on the ground that the plaintiff did not make out a case entitling him to such a relief.

The defendant is dissatisfied with the judgment and has therefore brought this appeal. In all, seven grounds of appeal were filed. They are as follows:

- “1. Judgment is against the weight of evidence.
2. The learned trial Judge erred in law and on the facts in failing to observe that having regard to the evidence before him the crucial issue in this case is whether the plaintiff or the defendant has established a better title to the land in dispute especially having regard to the fact that the land was bush land and had not even been surveyed by the plaintiff at the time he commenced building thereon.
3. The learned trial Judge erred in law and on the facts in deciding that the plaintiff was in possession of the land in dispute when, on the evidence before him, title to the land was clearly vested in the defendant.
4. The learned trial Judge misdirected himself in law in holding as follows:

- (a) The truth is that the Oloto Chieftaincy Family very well knew that it had no right to deal with the land having previously divested itself of the interest in the land in favour of Pachecco Pedro.”
- (b) I accept the evidence that the land in dispute was part of the large area of land which had been given to Pachecco Pedro by the Oloto Chieftaincy Family.”

Particulars of Misdirection

- (i) There was no allegation in the pleadings to the effect that Pachecco Pedro derived title from the Oloto Chieftaincy Family; accordingly evidence on the point did not to go any issue.
- (ii) The evidence of plaintiff’s witnesses on the point was contradictory and unreliable.

5. The learned trial Judge erred on the facts in holding as follows:

“It is my finding that the land subject matter of this action formed part of the land of Pachecco Pedro and that the houses built thereon were all built by the grantees of Pachecco Pedro or his successors.”

when such finding is contradicted by admissions made by the plaintiff’s witnesses under cross-examination as well as by unimpeachable evidence by defendant’s witnesses.

- 6. The learned trial Judge erred in law and on the facts in making use of his inspection of the site (at the stage he made it)
 - (a) for the purpose of making himself a witness of disputed facts; and
 - (b) for the purpose of admitting additional evidence after both parties had closed their case.
- 7. The learned trial Judge erred in law in failing to observe
 - (a) that the plaintiff did not plead or prove ‘long possession’; and
 - (b) in any event ‘long possession’ can only be a weapon of defence and cannot assist a plaintiff to establish title to land.”

At the hearing of the appeal the sixth ground was by leave abandoned and accordingly struck out.

Chief Williams, learned counsel for the defendant then sought and obtained leave of the court to argue firstly grounds 1,4 and 7 together and secondly grounds 2, 3 and 5 also together, and did so. But in view of the decision we have reached in the appeal we think it would be sufficient for the purpose of the appeal to summarise the pith and substance of the submissions addressed to us by Chief Williams on all the grounds together.

In his submissions, learned Counsel concentrated his attack on the plaintiff’s statement of claim and the evidence produced in support thereof generally. He neatly pointed out generally the apparent weakness in the plaintiff’s case. In particular, he contended that the plaintiff’s statement of claim was defective in that it alleges that the land in dispute whereof the plaintiff claimed to be in possession was allotted to Pachecco Pedro in 1861 by Consul Campbell but failed to disclose how the latter came by or who were the original owners of the said land in Lagos; in other words, that the statement of claim fails to disclose Pachecco Pedro’s real root of title; that the evidence proffered in support of the plaintiff’s claim was contrary to the averments in the Statement of Claim in that according to Alhaji Lasisi Bakare Fagbayi (P.W.3), a member of the Oloto Chieftaincy Family, the land in dispute forms part of the area of land in Iwaya, Yaba, which was granted absolutely by the Oloto Chieftaincy Family

at the request of Oba Dosunmu to Pachecco Pedro; that the plaintiff was himself vague as to the right which he acquired in the land in dispute in that in one breath he said he had bought it and in the next, that he rented the land from Amusa Pedro and that his deed of lease was in the possession of the Police, but failed to produce the same at the trial; and in another, that he was merely let into the possession of the same in consequence whereof he erected a “bulldog” building thereon.

Chief Williams also dealt at length with discrepancies in the evidence of the plaintiff and his witnesses with which he contrasted the evidence of the defendant and his witnesses to the disadvantage of the former. He contended that the evidence given by Alhaji Lasisi Bakare Fagbayi, (P.W.3) was rather in support of the defendant’s case in so far as the root of title was concerned, the original owner of the land, according to him, being the Oloto Chieftaincy Family from whom the defendant had obtained his deed of conveyance, Exhibit 7, in the proceedings. He submitted further that the plaintiff was never in possession of the land in dispute, and if he was, he was unable to justify such possession. Finally, learned counsel submitted that the learned trial Judge erred in law to have entered judgment for the plaintiff when the latter was unable to show a better title to the land in dispute or any title at all, particularly as it turned out to be common ground that the original ownership of the land was in the Oloto Chieftaincy Family.

These are impressive submissions which cannot be lightly brushed aside. We have, ourselves, examined with considerable care the pleadings and the whole of the proceedings and judgment in the case. At first view the matter appears simple and straight-forward bearing in mind the **well-established principle of law that in an action of trespass in which the issue of title is raised, in order to succeed a plaintiff must be able to show a better title to be in possession of the land the subject matter in dispute than the defendant therein.**

The case of the plaintiff does not seem to us to have been particularly carefully and satisfactorily handled and presented before the learned trial Judge. For otherwise, it strikes us as strange and inexplicable that in view of the averments contained in paragraphs 4 and 5 of the plaintiff’s statement of claim, Alhaji Lasisi Bakare Fagbayi (P.W.3), whose evidence was at variance with the said averments, should ever have been called as star witness for the plaintiff; and, if indeed, his evidence which appeared to have been accepted by the learned trial Judge was the correct historical basis of Pachecco Pedro’s root of title in the land in dispute, that the statement of claim was not amended accordingly.

Paragraphs 4 and 5 of the plaintiff’s statement of claim reads as follows:

- “4. The land in dispute is a portion of Pachecco Pedro Farmland at Iwaya.
5. That Pachecco Pedro was one of the 88 allottees of Consul Campbell in 1861 and Pachecco Pedro otherwise known as Daddy Pedro was allotted the farmland at Iwaya in Yaba District, now known as Pedro village.”

It may be observed that, although the plaintiff’s statement of claim was by leave amended in certain respects on 13th January, 1969, after the plaintiff and two of his witnesses had testified, yet the two paragraphs of the statement of claim set out above, which obviously formed the foundation of Pachecco Pedro’s title to the land according to the statement of claim remain unaffected. They were in fact repeated in the amended statement of claim. Then on 16th January, 1969, Alhaji Lasisi Bakare Fagbayi (P.W.3), was called as a witness for the plaintiff and he gave evidence.

As we consider his testimony very important and most relevant to the complaint by the defendant in his appeal we reproduce the evidence hereunder in so far as the same is relevant to the issue under consideration. Testifying for the plaintiff, Alhaji Lasisi Bakare Fagbayi (P.W.3), said inter alia:-

“I belong to the Oloto Chieftaincy Family. I know Tiamiyu Fagbayi, deceased. He has died. In his life time he was the Chief Oloto of Oto. Jaiyesinmi Ogundimu succeeded the deceased as Chief Oloto. I know the Pachecco Pedro family very well. The Oloto Chieftaincy family gave

their ancestor Pachecco Pedro land to build on. The land is at Iwaya. It was a gift made absolutely. At that time the Chief Oloto was Chief Balo. According to history, Oba Dosunmu begged Chief Oloto to give Pachecco Pedro the land. One European gentlemen had taken Pedro to Oba Dosunmu who sent for Pedro and for Chief Oloto. Chief Oloto then asked members of his family to take Pedro to the land. They showed Pedro the portion to be given to him. Prayers were said and customary rites were performed. The land in dispute is part of the land given to Pachecco Pedro. Tiamiyu Fagbayi was a brother of my father. He was my uncle. In our family we have the Fagbayi branch of the Oloto Chieftaincy Family. It was over 100 years ago that the Oloto Chieftaincy Family gave Pachecco Pedro the land. Since then I never heard that the rights of Pedro had been challenged on the land. Similar gifts were made to other persons in Lagos.

It was in this case that I first learned that the Oloto Chieftaincy Family makes claim to the land in question. It is in this case that I just heard that Oloto Chieftaincy Family sold land to the defendant. We do not agree that land already given out should be sold again. I represent in this case the Fagbayi Branch of the Oloto Chieftaincy Family. That Branch disagrees that land already given away should be sold again.”

On 15th March, 1969, as already stated, with the consent and in the presence of the parties, their witnesses and counsel, the learned trial Judge at the conclusion of the evidence in court inspected the land in dispute for the purpose of testing and checking the evidence given in court. In the course of the inspection, according to the notes made by the learned trial Judge, he saw the houses and bakery belonging to Lawal Fuja (P.W.5) and Mrs. Senobia Adetutu Coker (P.W.6) both of whom had testified to the effect that they had bought their respective portions of land in Iwaya from the family of Pachecco Pedro and had built their houses thereon. There were also many other houses along the whole length of the street some of which appeared to the learned trial Judge to be about 30 years old belonging to many other persons. All these houses were within the area of land claimed by the defendant to be his by virtue of the conveyance of 16th August, 1965, Exhibit 7, but outside the portion in dispute between the plaintiff and the defendant. On being questioned as to when and how these houses of such age belonging to persons neither his tenants nor the tenants of the Oloto Chieftaincy family came to be on the land claimed by him, the defendant admitted that the owners of the houses had been there a long time but described them as “trespassers.”

The defendant at the trial for the purpose of establishing his title to the land in dispute and his right to the possession thereof relied heavily on the conveyance, Exhibit 7, for the proof of which he had to depend on the evidence of the present Chief Oloto, Emmanuel Jaiyesinmi Ogundimu (D.W.1) who, in the course of his evidence, had to admit that the Oloto Chieftaincy Family sold land at Iwaya to Pachecco Pedro at the time and at the request of Governor Glover. He, however, maintained that the land so sold did not include the land in dispute. He also made an astonishing revelation that before he executed Exhibit 7 in favour of the defendant he did not go to see the land sold and assured by the conveyance, Exhibit 7. To put it in his own words, Emmanuel Jaiyesinmi Ogundimu said:

“The land sold to Pachecco Pedro was by word of mouth and not by any document. Before I signed the conveyance in favour of the defendant I did not go to see the land being sold to him. Defendant came to me and said he wanted to buy the land which he had seen at Iwaya. I then sent agents to look at the land. My representatives did not tell me that they had seen a building on the land the defendant wanted to buy. What my representatives had told me was that the land had not been previously sold by my family. If my representatives had told me that there were houses on the land I would make investigation from those on the land.”

In dealing with the evidence of the defendant and his witnesses the learned trial Judge, in our view not without justification, said inter alia:-

“I am unable to accept the evidence adduced on behalf of the defendant that the land in dispute had been in the possession of Oloto Chieftaincy Family until in 1964 when they sold it to the defendant and that since then the land subject matter of the deed of conveyance, Exhibit 7, which includes the one in dispute, was in the possession of the defendant. Chief Oloto gave evidence to

the effect that the Oloto Chieftaincy Family owned all the land at Iwaya and that that family sold land to Pachecco Pedro's family which land did not include the land in dispute and which land was near the foreshore."

As regards the conveyance, Exhibit 7, in relation to the land in dispute the learned trial Judge said:-

"Chief Oloto merely accepted the word of his representatives and proceeded to execute Exhibit 7 which covers over 9 acres of land and all that for £200. This is typical of the attitude of the Oloto Chieftaincy family. Land of which they were never in possession for pretty over 100 years and of which their forebears had divested themselves of any interest they had was being conveyed without caring that it had been previously transferred to other persons by them. The Chief Oloto said his family exercised acts of possession by 'letting out, selling and leasing'. The truth is that the Oloto Chieftaincy Family very well knew that it had no right to deal with the land having previously divested itself of the interest in the land in favour of Pachecco Pedro."

We have gone this length of examining the evidence in this case because the substance of the complaint by the defendant was against the weight of the evidence given in support of the plaintiff's claim. In the natural course of event and in law, the learned trial Judge, having found against the validity of the defendant's conveyance, Exhibit 7, which was put in issue, the plaintiff would normally have been entitled to succeed in his action for trespass had his possession of the land in dispute been firmly established. See *Alhaji Fasasi Adeshoye v J.O. Shiwoniku (1952) 14 WACA 86*. In that case, Sir Stafford Foster-Sutton, President of the West African Court of Appeal in his judgment said at page 87:

"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."

In the present case on appeal, we do not, however, think that on the evidence before the learned trial Judge, the plaintiff was entitled to judgment. The plaintiff was uncertain as to his interest in the land in dispute and his right to be in possession thereof. We agree with the learned counsel for the defendant that the evidence produced in support of the plaintiff's case was contrary to the averments in his pleadings as regards his root of title. Up to final judgment, no leave was sought and none obtained to amend the pleadings nor, indeed, were the pleadings ever amended to accord with the evidence given in support of the plaintiff's case.

After the most anxious consideration of the whole of the proceedings and judgment in this case, and the submissions made to us by the learned counsel for the defendant and in view of the findings by the learned trial Judge as regard the defendant's title to the land in dispute, we take the same view as was taken in *Uzonwanne Nwakuche v Peter N. Azubuike & 2 Ors. (1955) 15 WACA 46*, in circumstances, not unlike the present, that the plaintiff's statement of claim was defective in that it failed to explain in sufficient detail and with accuracy Pachecco Pedro's root of title as well as the nature of the plaintiff's interest in the land in dispute. On the evidence the plaintiff is an illiterate fisherman, and it may well be that the counsel who prepared the statement of claim was imperfectly instructed or he may have failed to appreciate fully the importance of setting out clearly that Pachecco Pedro's family had acquired their land, a portion whereof is the land in dispute, from the Oloto Chieftaincy Family. In all the circumstances of this case, we are of opinion that in order to avoid a possible injustice, particularly to the family of Pachecco Pedro, who were not a party to the suit and to whom the Oloto Chieftaincy Family admitted having sold land at Iwaya, the appropriate order to make in this appeal is one of a non-suit rather than a dismissal as was urged upon us by the learned counsel for the defendant.

In the result, this appeal is allowed. The judgment and order of the High Court of Lagos in suit No LD/105/67 awarding the plaintiff £80 general damages with £47.5s. costs are hereby set aside. Instead, the plaintiff is non-suited in his claim with costs to the defendant fixed at 35 Guineas, and this shall be

the judgment of the court. The defendant is also entitled to the costs of this appeal which we assess and fix at 70 Guineas. Order accordingly.

Counsel

Chief FRA Williams For the Appellant