IN THE SUPREME COURT OF NIGERIA

Suit No: FSC46/1963

Petitioner: James Oguntimeyin
And
Respondent: Kpekpe Gubere Namigin Rhoraye (For themselves and on behalf of Oria Fmilly of Aladja)

Date Delivered: 1964-04-24

Judge(s): Lionel Brett, John Idowu Conrad Taylor, Vahe Bairamian

Judgment Delivered

I

n this appeal the defendant complains of the judgement given by Kester J. in the Warri Suit No. W/87/1957 in favour of the Oria family. The Oria case was that they were the owners of a large area known as Ekrorhior Quarter at Aladja; that within it, in years gone by, the Orias had granted two enclaves to ancestors of the defendant, but he was laying a claim to more.

The Orias began their suit with a plan marked Exhibit B; (it is plan No MWC/40/57); on it their land was shown verged blue, and the enclaves verged pink. Learned counsel for the defendant tells us that the Claim originally was for a declaration of title to the land edged pink, and an injunction. In the Statement of Claim the Orias ask for a declaration to the land verged in blue, and an order restraining the defendant from entering beyond the areas verged in pink. That was clear enough: it conceded to the defendant the two enclaves - one to the east and the other to the west of the road shown on the plan, and the defendant was not to go outside them. There was, however, a mistake, namely that, without wishing it, the Orias were asking for a declaration which included those enclaves.

Paragraph 6 of the Defence states that' ''

\"The defendant is unable to understand plaintiffs\' contention as to the cause of action in the present suit and contends that on plaintiffs\' own showing in the statement of claim there ought to be judgement for the defendant in respect of the area verged pink to which area the defendant asserts his claim. In order to bring out this contention clearly defendant will at the hearing produce in court a plan of the area to which he lays claim and in respect of which he joins issue with the plaintiff. The defendant however joins issue with plaintiff only in respect of the land claimed by him in accordance with his own plan.\"

Adroit, but not quite candid; for the defendant\'s plan which is Exhibit C (No G. A. 290A/57) shows to the west of the road a much larger piece than the Orias were conceding, and the Orias were to wait until the hearing before they could see what it was. What was worse was this: shortly before the case was to come on, the defendant applied for leave to delete the word \'only\' near the close of paragraph 6 of his Defence; but in the event that was not allowed. The Court note of 25th May, 1960 states that ''

\"There is a dispute as to the extent of the land in dispute. I hereby grant leave for the Plaintiffs\' plan to be withdrawn and for the land claimed by the defendant to be shown in a different colour, on the plaintiffs\' plan and according to the scale to which the plaintiffs\' plan is drawn.\"

On the 26th May, counsel for the plaintiffs, realising that the area coloured pink on his plan was not in dispute, asked for an adjournment for three months, and had another plan made, namely the plan marked Exhibit A: it is plan No MWC/40B/57. When the hearing began he called the plaintiffs\' surveyor to put in the new plan, and the surveyor in his evidence under cross-examination, said that-

\"The area now in dispute amounting (perhaps a mistake for \'according\') to Exhibit A is the area verged pink to the

North West of the area edged green in Exhibit A.

The areas marked pink and green in Exhibit A are the areas represented in this plan No GA/290A/57 produced in Court'.

The note goes on to state \"Plan produced and tendered by the defendant marked Exhibit C.\" For convenience, it would seem, the defendant\'s surveyor was called next as the first witness for the defendant, and he confirmed what the plaintiffs\' surveyor had testified. Thus at the outset of the trial both sides knew what was in controversy between them.

There was a formal defect left by oversight: Plaintiffs\' counsel did not ask for amendment of the Writ of Summons and of the Statement of Claim to bring them into line with the new plan, exhibit A, in the matter of colour. After the evidence was closed, learned counsel for the defendant began his address by referring to the claim, and drew attention to the writ of Summons and the description of the land over which title was sought as being edged pink; whereupon counsel for the plaintiffs asked leave to amend the writ to read in paragraph (a) \'blue\' instead; and the Judge adjourned for a week to let him bring a full application for any amendment he wished to make. The application brought was to amend the writ of summons so that the claim should be for a declaration to the land verged in blue, and for an injunction in regard to the land verged pink: pink was, on Exhibit A, the plaintiffs\' new plan put in at the outset of the trial, what the defendant claimed as his own over and above what the plaintiffs con'ceded which was shown in green. In addition the application asked for amendment of the Statement of Claim on similar lines.

At the hearing of the application, counsel for the defendant argued that the amendment should not be allowed on the ground that it was embarrassing to the defence, which was conducted on the basis of the averment in the Defence; that the plaintiffs had made a mistake in not amending their pleadings before the close of their case, and it was too late to ask for leave to amend after the evidence of both sides had closed. Plaintiffs\' counsel argued to the contrary. The trial Judge gave a considered ruling, in which he referred to what Bramwell, LJ. said in Tiddesley v. Harper, 10 Ch.D. 396 and 397, in favour of giving leave to amend, however late the proposed amendment, when the party applying was not acting mala fide or had not by his blunder done some injury to his opponent which could not be compensated for by costs or otherwise; and later on the trial Judge observed that ''

\"Both sides know without the colouring on the plans, the area in dispute and for which the plaintiffs are seeking a declaration of title and injunction; and it is the area shown as land of Oguntimeyin (defendant) in the plan Exhibit C filed by the defence. The whole case has been fought by both sides on this basis, and the amendment if granted will, in no way, alter the cause of action or be embarrassing to the defendant. On the other hand it would afford a fair trial of the suit and for the purpose of determining the\' real questions in controversy between the parties.\"

The learned Judge granted the amendment asked for.

When the hearing was resumed, counsel for the defendant said that by oversight he had not put in some court papers he had wanted, and counsel for the plaintiffs agreed that they should come in; and thereafter counsel for the defendant addressed the court on the case; his opponent replied, and later the court gave judgement for the plaintiffs granting the declaration and the injunction sought; from which the defendant has appealed.

His first and major complaint relates to that amendment; he objects that it was a wrong exercise of the Judge\'s discretion to allow an amendment which went to the root of the matter in controversy at a stage gravely prejudicial to the case for the defence; and his learned counsel cites Loutfi v. C. Czarnikow, Ltd. (1952) 2 All E.R. 823, for his submission that after the evidence has been heard, unless there is strong ground and justification for amendment, there should be none. His argument is that there was no such ground and that, as the amendment was sought after defendant\'s counsel had pointed out the inconsistency between the plaintiffs\' plan and their Statement of Claim, the leave to amend was to the prejudice of the defendant.

Learned counsel for the plaintiff's points out that there was agreement on the areas from the start of the trial and the issue was clear; and he argues that as the amendment was made to bring their pleadings into line with the evidence, it falls within one of the cases for amendment mentioned by the learned judge in Loutfi etc.

The Court accepts this argument as correct. In Loutfi etc. no formal amendment was submitted until after both counsels had addressed the court. Sellers J. said (at p. 824 of the report)

\"I should allow that amendment because it is simply setting out in the pleadings that which has emerged in the course of the case as an issue between the parties.\"

In the present case either party called his surveyor at the start of the trial, and both parties agreed on what was in issue between them by reference to their plans. In effect they proceeded with the contest as if the plaintiffs\' pleading had been what it became after the amendment; all that the amendment did was to write down what the defendant had known all along to be the plaintiffs\' case. The amendment did not take him by surprise, and he has no just cause for complaint.

There is a suggestion for the defendant that he might have wished to call more evidence from other families. As this suggestion was made in reply, the Court has not the benefit of argument from the other side. After leave to amend was given, defendant\'s counsel in the court below put in some documents as part of his evidence, had he wished to call more witnesses, he could have asked for leave. He did not ask for leave to amend his defence; in it he claimed more land than was conceded to him, and there is no doubt that the oral evidence he called was with a view to show that he was entitled to the un-conceded part he claimed; and what that part was he knew from the start of the trial. The suggestion is theoretical only.

It is also argued for the defendant that the plaintiffs\' plan does not tell him where the boundary is between what is conceded and what is not. The parties knew when they began the trial where that boundary was on the ground, and now that there is a judgement by reference to a plan, it is easy for either side to call a surveyor to put pillars there.

The judgement is not altogether correct; that the plaintiffs\' learned counsel concedes; the declaration should be amended to exclude the enclaves in green.

Reverting to the grounds of appeal, there was the general ground that the judgement was against the weight of evidence; but the Court did not think that the criticisms made called for an answer and did not ask counsel for the plaintiffs to answer them. They were on details of the evidence which it is not necessary to discuss in this judgement, for they were adequately dealt with in the judgement under appeal.

It is true that the dispute between the parties relates to a comparatively small portion of the area to which the declaration relates; but it is also true that the defendant did not ask for authority to defend on his family\'s behalf, and it is the fact that at one stage he wished to amend his defence in a manner which would leave it open to him, or others of his family, to claim some other portion of the plaintiffs\' land. The defendant\'s plan and pleading make it clear that he and to all appearance his family, claim no more than what is shown in his plan GA 290A/57, and it is highly desirable not to leave it open to him at any rate, regardless of the position as it might affect other members of his family, to claim anything else, but to bind him by this Judgement.

The appeal is dismissed with thirty-five guineas costs to the plaintiffs/respondents in the Warri Suit No W/87/1957; but the decision of 6th July, 1962 given in the High Court of the Western Region at Warri in that Suit shall be varied and amplified as follows: '

Judgement for the plaintiffs granting them ''

(a) a declaration of title to the piece of land known as Ekrorhior Quarter Lying and situated at Aladja which is shown verged in Blue on Plan No MWC/40B/57 (exhibit A in the Suit), less the two pieces verged in Green on that Plan, as being the property of the Oria Family; and

(b) an injunction restraining the defendant, his servants and/or his agents from further erecting any buildings within and/or entering upon the portion of the land verged in Pink on the said Plan or for any purpose whatsoever without the authority and permission of the elders of the Oria Family.