IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL - ACCRA

CORAM - OWUSU, JA [PRESIDING]
TWENEBOA-KODUA, JA
BROWN, J

CIVIL APPEAL
NO. H1/278/04
22ND DECEMBER, 2006

ADE YAYA SHERIF … PLAINTIFF/APPELLANT
V E R S U S
(1) KOFI DUGBAVIE & ORS. }
(2) EMMANUEL AGAMA DUGBAVIE }
(3) VICTORIA DUGBAVIE } DEFENDANTS/RESPONDENTS
(4) SUSANA DUGBAVIE }
(5) MARTHA DUGBAVIE }

J U D G M E N T

IRIS MAY BROWN {MRS} J.

Plaintiff/Appellant in this case is appealing against an award of compensation made in his favour by the court below for the use of his land by the defendant.

Plaintiff's land plot number 110 registered in 1988 shares a boundary with Defendant's land plot number 111. It is Plaintiff's case that the Defendant insists on using a portion of Plaintiffs land as thoroughfare although an alternative route is available. Plaintiff built a wall across this area which was broken down by the Defendant. A writ filed by the Plaintiff claimed;

1. special damages for "breaking and destroying Plaintiff's wall"
2. general damages for trespass.
3. perpetual injunction restraining defendants from further interference
4. damages for assault.

During the trial, claims 1 and 4, for special damages for assault and for the destruction of the wall, the subject matter of earlier criminal

proceedings, were left out because as stated in the address of counsel for the defendant/respondents the defendants in a criminal prosecution "had been severally convicted and fined". The court was left to deal with issues 2 and 3 being claims for perpetual injunction and for general damages for trespass.

At the end of the trial the court found that the land trespassed on belonged to Plaintiff but that there was no alternative way available to the Defendant. The Court declared that the Defendant could not use the land without compensating the Plaintiff. It therefore ordered the defendant to pay compensation of ¢5 million.

Plaintiff has appealed on the basis that the award of compensation was an error in law because it was an award of a relief not asked for. Secondly the finding by the court that no alternative route was available was also erroneous. The Plaintiff is asking this court to set the award aside and give judgment on the claims sought by him at the lower court, and those are an award of damages and perpetual restraint of the defendant from using the land.

The Defendants did not dispute the ownership of the land trespassed on. They were merely contending that that the Plaintiff had no right to block the driveway because it was the only access to their home and they had a right of way.

There were diverse testimonies on the availability of alternative routes. The first witness on record admitted there were lanes and access routes, but that the Defendant had no direct access to the two roads. In his opinion that was a matter of negotiations between the affected parties. He however indicated Defendant could use plot number 114 as an alternative to Plaintiffs land. The 3rd witness for the Plaintiff, a building inspector with the AMA, and whose job according to the witness was to see to the orderly development of buildings, asserted that there was an alternative route, on the western side, used by all the landowners on the southern side. The only witness for the defence naturally denied the availability of an alternative route. He also worked with AMA but gave no indication as to his area of expertise. From the record before the court he was the least credible of all the witnesses, he even denied the existence of a gate and a bar near the alleged alternative route even though the Defendant had admitted there was a gate which he no longer used and indeed a bar on the boundary.

The records disclose that the court had gone to locus but results of the visit were not testified to.
From the exhibits tendered in it is obvious that defendants access to the main road on the west is through Plaintiffs plot 110 and to the other road lying south is through plot 114. Plots 109 and 112 are similarly blocked but whereas the Plaintiff maintains they use alternative routes also available to the defendant, he maintains that lane is not motorable.
The Defendant admits he built his house before Plaintiff did. He also admitted during cross examination (though he later denied this) that he had asked for access through Plaintiffs land and Plaintiff had promised to give him a small path as access. He had decided it was too small because he wanted to use it as a driveway.
The judge in this case gave no indication as to why it preferred the evidence of the defence that no alternative routes were available.

The counterclaim by the Defendant that he had the right of access was an issue which needed to be resolved but the court on that issue made no finding. The case turned merely on the non availability of an alternative route and upon that the court came to a decision which it considered to be fair to both parties. It suo motu assessed what it considered to be a just compensation, made the award thereby giving the defendant the freedom to continue using plaintiffs land.

By this appeal Plaintiff is asking the court to set aside the judgment and the remedies entered in his favour on the basis that the court had awarded a relief not asked for. He is asking the court to grant him the reliefs requested being general damages for trespass and a perpetual injunction restraining the use of his land by the Defendant.

A court of law has no right to grant a relief not sought. There might be situations where in the interest of both parties and to avoid prolonged repeated litigation it might be necessary to grant some relief though not sought for.
The case of NII BOI v ADU [1964] GLR 410 emphasises the inherent jurisdiction of the court to grant equitable relief where justice demands it. Similarly as stated in the case of MANU v GYAWU 1963] 2 GLR 440 A court can grant an equitable relief suo motu where no application has been specifically made for it. As further stated in the case "every suit implies an offer to do equity"
The exercise of this discretion however can only be done under strict conditions

1. the relief must first be supported by evidence on record

2. it must not be inconsistent with the stand and claim of the party in whose favour the relief is granted

see the case of IN RE GOMOA AJUMALO PARAMOUNT STOOL; ACQUAH v APAA and Another [1998-99] SCGLR 312.

Where it is possible the court must draw the parties' attention to the relief, give them an opportunity to respond or ask for an amendment so as not to take the parties by surprise.
ABDILMASIH v AMARH [1972] 2 GLR 414 ;

Defendant's counterclaim to be entitled to a prescriptive right over plaintiff's land is akin to a claim by a plaintiff, he bears the dual burden of the production of preponderance of evidence showing entitlement as of right or by operation of the law, and the burden of proving this evidence on a balance of probability. The Defence failed to do either. The courts would grant an equitable relief only when its existence had been clearly stated and proved by the evidence before the court.
FULANI AND ANOR v ISSAH [1980] GLR 319
Having based his sole claim on this right and having failed to establish same it was not open to the trial court to grant him any relief on any other basis see the holding in the case of MOTOR PARTS AGENCIES AND ANOR v YAW OFOSU [1963] 2 GLR 591

Where the preponderance of evidence, lean in favour of a particular finding of fact, then a finding by a court to the contrary, must be presumed to be an error unless convincingly proved not to be so.
The court is inclined to accept the submissions by counsel for the Plaintiff/appellant that the finding by the judge that no alternative route was available to the Defendant is an erroneous finding of fact.

The Judge having found, based on admission by the defendant that the plaintiff is the undisputed owner of the land trespassed on should have given judgment in favour of the plaintiff and not in favour of the wrongdoer.

The self assessment of compensation by the judge and the imposition on the plaintiff is void as it amounted to selective justice not based on any evidence or rule of law. It is considered as an act without jurisdiction.
As stated in the case of IN RE GOMOA AJUMAKO PARAMOUNT STOOL; ACQUAH v APAA and Another [1998-99] SCGLR 312 a judge who acts in such a manner has "abandoned its judicial duty and turned itself into a settlement committee by granting a compromise judgment not

sought for by either party A court which does that acts without jurisdiction and its judgment cannot be justified"

Court must not find itself in a situation where party having won a case nevertheless finds itself deprived of the fruits of its victory see the case of UNIVERSITY OF CAPE COAST v ANTHONY [1977] 2 GLR 21

The appeal should be allowed. The Plaintiff is entitled to perpetually restrain Defendants from trespassing onto his land.

In respect of the claim for damages an award of general damages for trespass by a Court is said to be at large, see FORSON v KOENS [1975] 2 GLR 479 citing DUMBELL v ROBERTS [1944] 1 All E.R 326. It is said to represent the disapproval of the courts for the improper interference with the personal rights of the Plaintiff. Damages are awarded to punish and to deter future misconduct. The court looks at all the circumstances including the conduct of the Defendant. The Defendant in this case had refused to follow the normal process of negotiating for a vehicular thoroughfare but had decided to take the law into its' own hands. The court has taken note of the fact of a prior criminal process and would therefore in this instance award a nominal amount of ¢2,000,000.00 (Two million cedis)

IRISMAY BROWN {MRS}
JUSTICE OF THE HIGH COURT

OWUSU, J.A. - I have had the opportunity to read the judgment of my sister and I agree with the decision arrived at and the reasons informing it. I however wish to add a few words of my own.

The facts of the case have been set out in her judgment and I will therefore not recount them.

The only issue set down for hearing is "whether or not there is an alternative access to the Defendants' house apart from the plaintiff's land.

The main issue between the parties as I see it is one of easement which is not dependent upon "whether or not there is an alternative access to the Defendants' house apart from the plaintiff's land.

An easement, according to Section 139 of the Land Title Registration Law of 1986, (P.N.D.C.L. 152) is "a right capable of existing----------under the rules of common law attached to land and allowing the proprietor of the land or of an interest therein either to use another land in a particular manner or to restrict its use to a particular extent-------"

The trial Judge, having come to the conclusion that the land being used by the Defendants as an access way belongs to the plaintiff, should have considered the Defendants' claim that they have a right of way.

Having set down the issue as to whether or not there is an alternative access to the Defendants' house apart from the plaintiff's land, the court failed to resolve it. Even though there was a visit to the locus, the record does not say anything about it.

The trial Judge did not make any finding that there was no way the Defendants could get to their house without using the plaintiff's land. The attack on the trial Judge under the second ground of appeal is not supported and same therefore must fail.

The Defendants who counter-claimed for a right of way, have the burden to prove the existence of that right. The evidence of the 1st Defendant in court did not establish any such right. This is what he told the court:

"When he built his house he told me he will give me a small path as access to my house but I told him the place was too small because I had a vehicle."

The Defendants cannot even rely on easement by prescription the essentials of which have been set out in the case of **DALTON VRS. ANGUS & CO [1881**] T App. cases p. 740 at 773.

Fry J. said in his Judgment that –

"The whole law of prescription rests upon acquiescence. I cannot imagine any case of acquiescence in which there is not shown to be in the servant owner-knowledge of the acts done;

2. a power in him to stop the acts or to sue in respect of them and
3. an abstinence on his part from the exercise of such power

If the Defendants failed to establish their right of way, then the court should have granted the plaintiff the perpetual injunction order that he claimed in the light of the evidence that the plaintiff is owner of plot No. 110 through which the Defendants sought to claim the right of way.

The court could not by the order of compensation impose an obligation on the plaintiff to grant the Defendant a right of way.

R.C. OWUSU
JUSTICE OF APPEAL

I agree.

K. TWENEBOA KODUA
JUSTICE OF APPEAL

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