IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE COURT OF APPEAL OF THE GAMBIA

CIV. APPEAL NO: 66/2009

BETWEEN:

AMIE SANYANG ..... APPELLANT

AND

BAKARY SANYANG ..... RESPONDENT

CORAM: THE HON. MRS. JUSTICE N. SALLA – WADDA J.A. (PRESIDING)

THE HON. MR. JUSTICE E.O. FAGBENLE J.A.

THE HON. MR. JUSTICE E.F. M'BAI Ag. J.A

REPRESENTATION:

E.E. CHIME Esq. FOR THE APPELLANT

S.B.S. JANNEH Esq. FOR THE RESPONDENT

DATED THE 17TH DECEMBER 2013

LEAD JUDGMENT BY HON. JUSTICE N. SALLA – WADDA J.A.

This is an appeal against the judgment of the High Court of The Gambia presided over by Hon. Justice Avril Anin Yeboah delivered on the 13th of November 2009 in Civil Suit No: CS 152/2003. The writ of summons dated the 18th day of November 2009 contained the following claims:

(1) The ejectment of the Defendant from his leasehold premises situate at Bundungka Kunda, KSM, The Gambia S.R. No. K335/1985 and for possession thereof.
(2) Costs
(3) Further or other relief as the Court deems fit.

The defendant also filed a statement of defence and a counterclaim as follows:

1. A declaration that the defendant is the rightful owner and in possession of the property situate at Bundungka Kunda and numbered 332 in the Kanifing Urban District Council/Kanifing Municipal Council Rates Register for Bundungka Kunda.
2. An order that the Plaintiff does all such acts and execute all such documents as may be necessary to transfer to the Defendant the said property purportedly leased in the name of the Plaintiff bearing lease Serial Registration No. K335/1985.
3. An injunction restraining the plaintiff by himself, his servants or agents or otherwise howsoever from entering the said land and/or interfering with the Defendant's rights and title thereto.
4. Further or other relief.
5. Costs.

The Learned Trial Judge after analysing all the evidence adduced in the case held that she had compared the two sets of evidence regarding title to the Suitland and was satisfied that the evidence led by the plaintiff was more probable than that of the defendant and that the plaintiff had a better title to the Suitland than the defendant. The Learned Trial Judge further in the judgment made a finding

that all the acts done by the defendant on the Suitland were acts of trespasser. It is against the background of this decision and in dissatisfaction thereof that the defendant has filed the instant appeal with the following grounds of appeal:

GROUNDS OF APPEAL

i. The Learned Trial Judge erred in law in failing to avert her mind to the well known principle that in a claim for a declaration of title, the duties of a Trial Judge is mainly to ascertain whether the Plaintiff/Claimant has discharged the burden of proof on him which will entitle him to declaration.

ii. The Learned Trial Judge erred in law by relying on the weakness of the defendant's case rather than the strength of the plaintiff's case in entering judgment against the defendant.

PARTICULARS OF ERROR

a) The burden of proof does not lie on the defendant rather on the plaintiff.

PARTICULARS OF ERROR

a) That the Learned Honourable Judge's decision in entering judgment against the defendant without averting her mind and addressing the evidence of all the witnesses of the defendant.

RELIEF SOUGHT FROM THE GAMBIA COURT OF APPEAL

a) That the judgment is wrong and ought to be set aside as it is not supported in law.

To argue this appeal, the parties have filed and exchanged briefs of argument. The facts of this case in brief are that the appellant and the respondent are siblings of full blood. They each claim ownership of a piece of land situated at Bundungka Kunda in the Kanifing Municipality. The plaintiff ordinarily resides in Dakar, Senegal. It is his claim that he acquired the Suitland in 1968 and in 1977 the Alkalo of Bundungka Kunda and the Chief Executive Officer of the then KUDC

confirmed his ownership of the property which was numbered 291 for rating purposes. The plaintiff testified in the case and called four witnesses (even though the testimony of the fourth witness for the plaintiff was later expunged from the record). In his testimony before the trial court on the 21st of June 2004, the plaintiff told the court that he had acquired the property in question from one Hamadi Conteh who was the Alkalo of Bundungka Kunda in 1968. He testified that he was given a document which was not stamped and which was tendered as Exhibit B.

The witness testified that the reason for the absence of the Alkalo's stamp on Exhibit B was because the Alkalo was illiterate and thumbprinted his documents instead. He testified that the Alkalo did not even own a stamp at the time. The plaintiff tendered a number of receipts for the payment of rates in 1975/76, 1976/1977, 1977/1978 and for 2002/2003. They were marked as Exhibit C, C1 and D respectively. These receipts were confirmed by a former Chief Executive Officer of KUDC, now KMC as being genuine receipts.

The plaintiff also tendered a State lease with serial registration number K335/1985 dated the 5th of July 1985. In his testimony, the plaintiff told the court that he bought the Suitland and brought his mother and sister (the defendant herein) and other members of his family to live there. The plaintiff testified that he built a one bedroom house on the Suitland and that is where his mother and sister and other family members resided. That as he was working for the American Embassy in Dakar and at various other posts, he used to send money regularly to his mother, through his sister, the defendant for the upkeep of the family.

The defendant on the other hand from the record also testified in her own defence and called six other witnesses. She testified that she also acquired the Suitland in 1968 and has been paying rates to the K.M.C. since then. She testified that she bought the land from one Saada Sowe, who was a shepherd and lived in the same neighbourhood with her. She testified that when she bought the land, Saada Sowe did not give her any documentation. She did not have any witnesses to the said purchase. One of the witnesses she called in her defence was the Alkalo of Bundung, one Abdulai Trawally whose testimony on the 21st of May 2008

was that he was told by Saada Sowe that he sold the land in question to the defendant. The said Alkalo also testified that he gave the land to Saada Sowe as he was their shepherd. Saada Sowe himself or any of his relatives never testified in the matter. The defendant tendered some rate receipts and demand notes issued to her in the 1980s which were marked as Exhibit 1 -1v and Exhibit 2b. Those receipts started from the period 1981/82. The defendant claims in the record from her testimony at the court below that she kept her earlier rate receipts in her mother's trunk which was stolen. There was however no evidence adduced before the trial court to prove that her mother's trunk containing her earlier rate receipts was stolen. The defendant also tendered a Certificate of ownership of Property dated the 23rd of June 1995 and marked as Exhibit "3B" as well as a Planning Clearance dated the 4th of June 1995 marked as Exhibit 3A. These were thus the evidence led by both parties to the claim for title of the Suitland.

To argue this appeal, the appellant has formulated the following four issues for determination:

1. Notwithstanding the Appellant/Defendant's counterclaim, did the Learned Judge avert her mind to the long standing principle that the burden of proof lies on the party asserting the affirmative and who will fail if the burden is not discharged?
2. Did the plaintiff/respondent in a case for declaration of title lead strong and positive evidence to establish his case?
3. Was the learned judge right in relying on the weakness of the Appellant's case?
4. Did the Plaintiff sufficiently and affirmatively prove his case to earn victory?

The respondent submitted the following lone issue for determination as follows:

1. Whether the appeal is competent having regard to the grounds of appeal.

To determine this appeal, I have formulated from the issues set out for determination by the parties herein, the following as the issues for determination

which are to my mind well poised to aid in the determination of this case. These issues are as follows:

1. **Whether the appeal is competent having regard to the grounds of appeal.**
2. **Did the plaintiff/respondent in a case for declaration of title lead strong and positive evidence to establish his case?**
3. **Did the Plaintiff sufficiently and affirmatively prove his case to earn victory?**

ISSUE NO.1:

WHETHER THE APPEAL IS COMPETENT HAVING REGARD TO THE GROUNDS OF APPEAL.

It is the respondent's submission that this appeal is incompetent as not even a single ground of appeal attacked the findings of fact or law of the judgment at the court below. He submitted that the most important finding of the learned trial judge that is to be found at Page 38 of the copy of the record held by the Court that she found as a fact that the plaintiff has a better title to the Suitland which as a result of such finding "all the acts done by the defendant, even if true, now have become acts of trespass" was not the basis of any of the grounds of appeal contained in the notice of appeal herein and was not challenged by the appellant. Counsel for the respondent submitted that the other important facts found by the learned trial judge such as that of Exhibit A, the State Lease that was not attacked in cross examination by the defendant was in fact not challenged by any of the grounds as well as Exhibit B which was in fact confirmed as being a genuine document despite being undated by a defence witness. As such the respondent contends that since there is no attack on the findings of fact or law of the trial court, then the appeal is incompetent. Counsel cited and relied on this Court's decision in HARO COMPANY LIMITED V OUSMAN JALLOW (2002 – 2008)1 GLR 128 and other cases outside this jurisdiction which held that where the finding of fact of the trial court is not appealed against, then the appellate court will decline to hear the party. Whilst I agree that it is the position of the law that where an appellant fails in his grounds of appeal to attack the very findings of the trial court on which he is aggrieved about but has not so stated them on his grounds of

appeal, then in such a case, such grounds of appeal will be deemed incompetent and will not he heard by the appellate court. Counsel for the respondent also relied on Rule 12 (4) of the Rules of this Court to show that where such grounds are found to be incompetent, they can be struck out either upon application by a party or can be struck out suo moto by the Court. Furthermore, the cases of **OKOYE V N.C. AND F. CO. LTD (1991) 5 LRCN 1547** and **ALAKIJA and ORS V ABDULAI (1998) 5 SCNJ 1** have held that even where such an appellant attacks the findings of the trial court only in his brief of argument and not on his grounds of appeal, such an appeal is still incompetent before the appellate court and the appellate court will decline to hear it. Having said this, however, ground 1 of the appellant's grounds of appeal, in my view seeks to challenge that part of the decision of the learned trial judge which held that she finds that the plaintiff has by the evidence a better title to the Suitland. The allegation in ground 1 is as follows:

> *"The Learned Trial Judge erred in law in failing to avert her mind to the well known principle that in a claim for a declaration of title, the duties of a Trial Judge is mainly to ascertain whether the Plaintiff/Claimant has discharged the burden of proof on him which will entitle him to declaration."*

Indeed, in my view, by this ground, the appellant is seeking to challenge that part of the trial judge's decision which held that she finds that the plaintiff has a better title to the Suitland than the defendant. For ease of reference, let me go back to that part of the judgment of the court below to be found at Page 39 of the copy of my record to see the particular finding of the trial judge in question. There the learned trial judge states as following:

> *"Upon comparing these two sets of evidence regarding title to the Suitland, I am satisfied that the evidence led by the plaintiff is more probable than that of the defendant. I find as a fact that the plaintiff has a better title to the Suitland."*

Certainly the ground of appeal herein as it is couched was seeking to attack this very finding of the trial court and is not the same as what is envisaged by this Court's decision in **HARO COMPANY LTD V OUSMAN JALLOW**. I therefore find that on the basis of this objection, the ground 1 is not incompetent as argued by the respondent. I find that ground 1 and 2 for the purposes of this objection are competent as they; in my view have linkages or relevance to the basis or material findings made by the trial court.

Still on this issue of the competence of the grounds of appeal, looking at ground1 of the grounds of appeal, I find that this ground merely states or alleges the error in law of the learned trial judge. This ground was not particularized in any way to show this Court the particulars of the misdirection or error in law being alleged violating **Rule 12 (2) GCA Rules**. **Rule 12 (2)** states as follows:

> ***"(2) If the grounds of appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated."***

In considering the issue as to the competence of the grounds of appeal herein suo moto, let me say again that it is trite that the competence of an appeal or otherwise ought to be resolved first before any other consideration of the appeal proper may initiate. I have found as a fact that this ground of appeal has not been particularized and as such have not shown in what way the alleged misdirections in law was occasioned by the trial judge as alleged or what part of it contained the alleged misdirection in law or how the alleged complaint of the misdirection was made. I find myself even at a loss in understanding what the ground is attempting to complain about because it does not show how the alleged misdirection or error was occasioned by the decision of the trial court. This understandably is moreso for the respondent who clearly by law; and apart from it being a requirement of fair hearing; has to be given notice of the issues in controversy in the appeal for them to be able to prepare themselves. See the case of **HARO COMPANY LTD V OUSMAN JALLOW** already cited by the respondent where **Agim JCA** as he then was held as follows:

"The purpose of the ground of appeal is to give notice to the respondent of the issues in controversy, just like pleadings are meant to give notice to the adverse party of the facts in issue during trial."

Fidelis Nwadialo in his book **Civil Procedure in Nigeria (2000 Edition)** at Pages 804, 807 and 808 stated on the issue of grounds and particulars of appeal that the: ***"their whole purpose is to give notice to the other side of the case they have to meet in the appellate court."***

This ground of appeal herein; has clearly offended Rule 12 (2) in that whilst the ground alleges misdirection or error in law, it did not particularize or state what if at all the alleged misdirections were. The ground therefore clearly became not only vague, but was also very general in terms. It therefore became clearly incompetent and within the contemplation also of **Rule 12 (4) of the Rules of this Court. Rule 12 (4) states as follows:**

"***(4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application be the respondent."***

See also this Court's decision in **EDWARD GRAHAM V LUCY MENSAH (2008) 1 GLR 22** where this Court had to determine a very similar issue regarding such a ground of appeal. This Court per **Agim JCA** (as he then was) held as follows:

".....this ground has not stated in what respect the judgement is erroneous it is therefore vague, general and disclose no reasonable complain. It is no ground of appeal. In the light of the foregoing, the only grounds of appeal contained in the notice of appeal are hereby struck out..."

See also the Gambian Supreme Court decision in **GREENGOLD LIMITED V KOMBO POULTRY FARM LIMITED (2008) 1 GLR 308.**

The Nigerian Supreme Court in the case of **NSIRIM V NSIRIM (1990) 5. S.C. (Pt. II) 94** held that the only way and manner that an appellate court should treat grounds containing no particulars of error or misdirection is to have them struck out under the rules. There is indeed a plethora of cases in support of this. See **OKEKE ANADI V OKEKE OKOLI (1977) 3 S.C.; MBA NTA V ANIGBO (1972) 5 S.C. 156 at 154** and **OSAWARU V EZEIRUKA (1978) 6-7 S.C.**

In the case of **ANYAOKE & ORS V ADI V ORS [1986] NSCC [Vol. 17 – Pt. II] 799**, the Nigerian Supreme Court had to determine whether it was necessary for the grounds of appeal to contain particulars of the complaint. That Court held that the grounds of appeal must contain the particulars of the complaints made in them and as such grounds which do not contain the particulars are defective and should be struck out.

In another decision, **BANKOLE & ANOR v AGBAJE & ORS [1966] NSCC [Vol. 43] 128** the Nigerian Supreme Court similarly held that the effect of a ground of appeal alleging error or misdirection in law which do not specify the particulars of the alleged error or misdirection does not give sufficient notice to a respondent and therefore does not comply with the rules of court.

The frontiers of this principle or position of the law as it were was further extended in **1984** when in the case of **AKWIWU MOTORS LTD V SONGONUGA [1984] NSCC [Vol. 15] 353,** the same Court with **BELLO JSC** delivering the lead judgment in that case, the Supreme Court in Nigeria unanimously in dismissing the appeal therein with cost held that a ground of appeal with no particulars drafted in support of that ground cannot even be heard as it is not properly before the court. This is my view clearly shows that the appellate courts have taken the stance of giving the provisions of the Rules of Court relating to this issue a more narrow and restrictive meaning and interpretation naturally because it strongly borders on the principles of fair hearing.

Furthermore, this position is so entrenched and has been held to be so sacrosanct that in my view, as I have said earlier, has been interpreted rather strictly in some decisions which have gone to the extent of holding that even where there is a failure by an appellant alleging an error or misdirection to state the particulars of such error or misdirection separately from the ground of appeal alleging such an error or misdirection, its effect is that it will render such a ground of appeal to be invalid. This was so held in the case of **ATUYEYE & ORS V ASHAMU [1987] NSCC [Vol. 18 – Pt. 1] 117.**

It is therefore on the basis of all these authoritative decisions and in the light of the clear provisions of the Rule 12 (4) that clearly grounds 1 of the appellants' grounds of appeal is incompetent and not arguable. **It is therefore accordingly struck out.** See **NSIRIM V NSIRIM (1990)** cited supra. Having said this, there is no gainsaying that because it is clearly obvious that this ground of appeal having already been found to be incompetent and so struck out do not in fact properly exist or exist at all for the setting aside of the judgment of the court below. What then remains on the appellant's Notice of Appeal is ground 2 with its particulars.

ISSUE NO. 2

DID THE PLAINTIFF/RESPONDENT IN A CASE FOR DECLARATION OF TITLE LEAD STRONG AND POSITIVE EVIDENCE TO ESTABLISH HIS CASE?

As said before, only ground 2 remains herein. The appellant's second issue just stated is borne out of this ground. The issue is whether in this case for declaration of title to land, did the plaintiff/respondent lead strong and positive evidence to establish his case.

It is the submission of the respondent and I quite agree with them that the learned trial judge has considered the burden of proof in land cases and held that the burden of proof in land cases was on the plaintiff to prove his case on its strengths. Without any doubt, the burden of proof in land cases is as rightly stated by the

learned trial judge on the plaintiff to prove their own case which certainly must be proved on the strength of their case and not on the weakness of the case of the defence. See the Supreme Court decision in **FATOU BADJIE AND 4 ORS VS JOSEPH BASSEN (2002 – 2008)2 GLR 115.** The plaintiff now respondent herein testified on his own behalf and called two other witnesses to prove his case on his ownership of the Suitland. In addition to this, the plaintiff tendered a number of exhibits such as a State Lease with Serial Registration number K335/1985 dated the 5th of July 1985 as Exhibit A. The plaintiff also tendered Exhibit B, an unstamped document he said was obtained from the Alkalo of Bundung Hamadi Conteh in 1968 on which a defence witness, DW 1 Abdoulie Trawally to be precise had testified that in 1968, the said Alkalo Hamadi Conteh never used to stamp his documents as during those days, he never had a stamp and that he only thumb printed them. The plaintiff in addition also tendered receipts as evidence of the payment of rates from the years 1975/1976/1977/1978 and 2002 and 2003. The plaintiff testified that the years that he did not pay rates was the period when he used to send the money to his elder sister the defendant/appellant to pay on his behalf as he has since the 1960s ordinarily been resident in Dakar, Senegal. These rates receipt were confirmed by another defence witness DW 6, Mustapha Njie, a former KUDC/KMC Chief Executive officer as genuine receipt of the Municipality. This was the case of the plaintiff. I therefore answer the question whether the plaintiff/respondent herein had in the case for a declaration of title to land led strong and positive evidence to establish his case in the affirmative. I say that this is certainly the case looking at the evidence placed by the plaintiff before the trial court. The decision in **FATOU BADJIE VS JOSEPH BASSEN** cited and relied on by the appellant the Supreme Court per **SAVAGE C.J.** (as he then was) held at Page 162 as follows:

> "**It is now settled that the onus lies on the plaintiff claiming title to land to satisfy the court that he is entitled on his evidence to a declaration of title. The plaintiff, as my brother has just explained, must rely on the strength of his own case and not on the weakness of the defendant's**

case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant."

The decision in **FATOU BADJIE** also outlined a number of ways on which proof of ownership of land can be done which are:

1. **By traditional evidence;**
2. **By production of documents of title;**
3. **By acts of the person claiming the land;**
4. **By acts of long possession; and**
5. **By proof of possession of connected or adjacent land.**

The plaintiff herein had proved his title to the ownership of the Suitland in one of the ways listed therein. Being assigned a State Lease in this respect since 1985 long before the defendant ever had a rates receipt in her name with other pieces of evidence of the Suitland is in my view and as rightly held by the learned trial judge placed the plaintiff on a platform of having proved his case on a balance of probabilities than the defendant had and established and proved a better case to the Suitland at the court below.

Let me add that the defendant who also testified and called six other witnesses did nothing and led no evidence to impugn on or challenge the veracity and reliability of all the Exhibits tendered by the plaintiff apart from merely alleging that the plaintiff obtained Exhibit A by false representation to the authorities. She did not plead fraud in her pleadings and neither did she lead any evidence to substantiate the allegation of fraud on the part of the plaintiff. She did not also call in any evidence to prove that her earlier rates receipts were paid from the time that she allegedly purchased the land to the 1990s was stolen with her mother's trunk as she alleges. None of the witnesses she called could say with any degree of certainty that she definitely owned the land. All the witnesses were in my view merely speculating on the ownership of the Suitland because they had seen her there and her mother all the time.

Furthermore, I agree with the learned counsel for respondent that the defendant as a counterclaimant at the court below, is considered as a plaintiff as regards the counterclaim and as such in her claim for declaration of title to land, the same rule would apply to the defendant too that she too must rely on the strength of her own case and not on the case of the other party whether weak or otherwise. Having said this, it is clear from the record of the court below that the defendant by the evidence she led at the court below as a counterclaimant did not prove her case regarding her claims at the trial court, thus the decision of the learned trial judge which held that the "*evidence led by the plaintiff is more probable than that of the defendant*" and thus thereby dismissing the defendant's counterclaim.

Having said this, I hold that the plaintiff/respondent had in this case for the declaration of title to land led strong, positive and probative evidence in the proof of his case.

ISSUE NO. 3

DID THE PLAINTIFF SUFFICIENTLY AND AFFIRMATIVELY PROVE HIS CASE TO EARN VICTORY?

Having already evaluated and considered Issue No. 2 above as I did. It is my view that the issues being identical in nature Issue No. 3 is subsumed and has also been evaluated under Issue No.2. I therefore see no further need to expansiate. Having said this and having held that the Plaintiff/ Respondent herein in this case for declaration of title to land has led strong, positive and probative evidence to establish and prove his case, I further hold that the learned trial judge did not rely on the case of the defendant weak as it was to make a finding for the plaintiff at the court below. Rather, it is evident from the judgment of the trial court that the learned trial judge based her judgment on the strength of the case of the plaintiff

which the defendant could not impugn at all**. I therefore dismiss grounds 2 of the grounds of appeal.**

The entire appeal is therefore dismissed with cost of TWENTY – FIVE THOUSAND DALASIS (D25, 000.00) against the appellant in favour of the respondent.

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HON. JUSTICE N. SALLA – WADDA JA

JUSTICE OF APPEAL

17TH DECEMBER 2013.

I AGREE.

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HON. JUSTICE E. O. FAGBENLE JA

17TH DECEMBER 2013.

I ALSO AGREE.

.....

HON. JUSTICE E.F. M'BAI Ag. JA

17TH DECEMBER 2013.