Privy Council Appeal No. 10 of 1989

Alhaji Bora Manjang *Appellant*

v.

Kebba Drammeh *Respondent*

FROM

THE COURT OF APPEAL OF THE GAMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
MR. JUSTICE TELFORD GEORGES

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from an order of the Court of Appeal of The Gambia (Livesey Luke and Anin JJ.A. and Ayoola C.J.) dated 18th December 1987 allowing, by a majority, the respondent's appeal from a judgment given on 14th July 1987 in the Supreme Court of The Gambia by Ejiwunmi J. whereby he dismissed the respondent's claim for a declaration and an injunction and entered judgment for the appellant for damages and an injunction restraining trespass by the respondent. By its order, the Court of Appeal purported to grant the respondent a right of way of necessity for himself and his servants and licensees on foot across the appellant's land, No. 63 Wellington Street, Banjul, granted an injunction restraining the appellant from interfering with the exercise of such right by the respondent and ordered the appellant to remove any obstruction of the way to a width of five feet and to restore a gateway on the appellant's land to its original position.

The appellant's interest in the land across which runs the right of way claimed by the respondent dates from the year 1982 but he had, for some years prior to that, carried on business from adjoining premises, No. 64 Wellington Street. That street runs parallel to but a short distance from the River Gambia, a tidal river over which it is not in dispute that the public have rights of

navigation, and the intervening space has been divided into lots upon which a number of commercial buildings have been erected. Between the rear of the lots Nos. 63 and 64 and the foreshore there is an area of land (conveniently referred to as "the river strip") which is and has for some years past been occupied by the respondent and from which he carries on business. The only direct access to Wellington Street from the river strip is across the appellant's land at No. 63 and, at the date when the appellant first acquired an interest in that property, there was, according to his evidence, a gateway facing onto Wellington Street from which there ran a pathway some four to five feet wide between two buildings on the frontage of the plot leading towards the river strip.

The origins of the respondent's interest in the land are obscure. At the trial it was his evidence that he was, at some time prior to 1976, in possession of No. 63 as the sub-tenant of Messrs. Maurel and Prom, who were the lessees of the property from the Government of The Gambia under a lease which expired in that year. It is not clear whether the lease of Maurel and Prom included that part of the river strip which lay behind No. 63 but the respondent's evidence was that he had been in possession of the river strip for some twenty years prior to action brought - a claim which he was entirely unable to substantiate and which the trial judge rejected. The judge did, however, accept his evidence that he had occupied the river strip prior to 1976 - as he found, without any legal title to do so - and that, between 1975 and 1976, he erected a number of buildings on it. After the termination of Maurel and Prom's lease of No. 63 and the consequent termination of the respondent's sub-tenancy, he remained in occupation of both that property and the river strip. As regards the former, he subsequently obtained a lease from the Government of The Gambia dated 2nd February 1977 for a term of twenty-one years with an option to renew for a further twenty-one years. It is under that lease that the appellant currently holds No. 63.

The river strip, however, was not included in the lease of No. 63. Some nine months after the grant of that lease the respondent appears to have made enquiry of the Government regarding this land and received the answer that it had been decided to allocate it to the Gambia Ports Authority. The respondent was advised that the Authority had been asked to permit him to erect a temporary store on the land and to retain it there free of rent until the Authority were ready to reclaim the area when he would be given one month's notice to quit without compensation. It was requested that he get in touch with the Authority. He did not, however, do so until some six years later but merely continued in possession. On 1st December 1983 the Gambia Ports Authority wrote to him offering to let the area to him for a term of twenty years and a lease

of the land was finally granted to him on 5th February 1986.

The dispute between the parties dates from the summer of 1982 when, the respondent having defaulted in payment of the judgment debt, execution was levied and his interest in No. 63 under the 1977 lease was sold by the sheriff at public auction, where it was purchased by the appellant. The property was subsequently assigned to the appellant by a deed dated 24th August 1982. Proceedings followed to obtain possession from the respondent and his sub-tenant and a possession order was made on 17th January 1983. An appeal to the Court of Appeal was dismissed on 1st December 1983. Thereafter the appellant set about developing the property by building across the frontage.

On 30th May 1983 the respondent commenced the proceedings from which this appeal arises. The primary case argued on his behalf at the trial was that he was entitled to an easement by prescription based upon twenty years uninterrupted user prior to action brought. The evidence adduced in support of this claim, however, was obviously hopelessly inadequate. All other considerations apart, the respondent had to face the difficulty, first, that his own case was that up to 1976 he was the tenant of both the dominant and servient tenements and, secondly, that he could not, in any event, possibly prescribe against his own landlord. His alternative claim, which was not originally pleaded but was raised by counsel in argument, was that the river strip was land-locked land and that he was entitled to a way of necessity. Perhaps not surprisingly having regard to the history already referred to, that claim does not appear to have been pressed with any degree of enthusiasm. In the result the trial judge dismissed the respondent's claim and entered judgment for the appellant on his counterclaim for an injunction and damages.

From this judgment the respondent appealed to the Court of Appeal. Counsel for the respondent does not appear to have attempted to revive or reiterate the claim to an easement by prescription and the argument before the court centred on the wholly irrelevant question of whether the respondent's status on the river strip was that of a trespasser or a licensee. What appears finally to have swayed the balance in favour of the respondent was counsel's suggestion that the court should "consider granting ... an easement of necessity", an invitation to which the majority of the court acceded. Ayoola C.J. delivered a strong dissenting judgment pointing out the essential characteristics of such an easement, none of which could be said to be satisfied on the evidence before the court.

Their Lordships have felt no hesitation in upholding the views of the Chief Justice. It seems hardly necessary to state the essentials for the implication of such an easement. There has to be found, first, a common owner of a legal estate in two plots of land. It has, secondly, to be established that access between one of those plots and the public highway can be obtained only over the other plot. Thirdly, there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access. Given these conditions, it may be possible as a matter of construction of the relevant grant (see *Nickerson v. Barraclough* [1981] 1 Ch. 426, 440) to imply the reservation of an easement of necessity. The respondent himself clearly could not fulfil the description of a common owner, for he had, at the time of the grant to the appellant in 1982, no title at all to the river strip. Nor was there anything in the circumstances of the grant of the lease to the respondent himself in 1977 or in its terms from which there could possibly be inferred a reservation in favour of the lessors for the benefit of the river strip which was subsequently allocated for use by the Ports Authority.

But all other considerations apart, the evidence clearly established that members of the public were able to and did regularly and without inconvenience obtain access to the river strip from the river and, indeed, a former business tenant of No. 63 gave evidence that the majority of his customers came that way. Although it is strictly unnecessary to rest a decision on this ground, their Lordships have been referred to a decision of the Court of Session in Scotland and to two Canadian authorities which established that an available access by water, albeit perhaps less convenient than access across terra firma, is sufficient to negative any implication of a way of necessity (see *Menzies v. Breadalbane* (1901) 4F. 59; *Fitchett v. Mellow* 29 O.R.6; and *Hardy v. Herr* (1965) 47 DLR (2d) 13). In the instant case, as Mr. Macaulay for the respondent was ultimately driven to admit, there was nothing at all from which a way of necessity in favour of the river strip could reasonably be implied and the Court of Appeal quite plainly had not, as the majority seemed to have thought they had, any jurisdiction to "grant" a right of way across a litigant's land simply because they considered, as they evidently did, that it would be convenient and was not "inequitable or unreasonable in all the circumstances".

Their Lordships accordingly allow the appeal and restore the order of the trial judge. The respondent must pay the appellant's costs before the Board and in the Court of Appeal.