

R. SANDYS AND ORS. (Appellants, Plaintiffs)
 v.
 N. 'OTUKOLO (Administrative of Estate of T. 'Otukolo)
 (Respondent, defendant)

This was a claim to a house. The Supreme Court (Hunter J.) found for the defendant on the ground that two of the plaintiffs withdrew their claim and that Mrs. N. Sandys had given no evidence to support her claim to ownership. The Privy Council (Hammett C.J.) held that though there was very little evidence of ownership the plaintiff's possession of the house raised a presumption of ownership and referred to S. 109 of Cap. 9.

On the 12th December, 1958 the Privy Council delivered the following judgment :

The Plaintiff-Appellants claim in the Court below was for a weatherboard house valued at £500 and an injunction. This house was well over 60 years old and had originally cost about 900 dollars.

The learned trial Judge ruled the Defendant had no case to answer on the ground that two of the Plaintiffs had given evidence that they did not claim the house and that the other Plaintiff, Mrs. Sandys, had not adduced any evidence to support her claim.

The house in question was the property of one Taukolo an uncle of Mrs. Sandys. It was situated on the leasehold land of Taukolo, the title to which he gave to Mrs. Sandys in 1943. He nevertheless continued to reside in this house, which is of the removable kind, and to exercise rights of ownership over it. Mrs. Sandys admitted in evidence that during the lifetime of Taukolo she knew that the house was his property. Since his death, however, the house remained in the possession of Mrs. Sandys.

Mrs. Sandys does not claim this house as the personal representative of Taukolo nor as a beneficiary under his estate but by virtue of the fact that it had been on her land from 1943 until Taukolo died and that it was then in her possession from the date Taukolo died up to the date this action was commenced.

The summons in this case was issued on 16th May, 1956 at a time when it is clear there was a dispute over the ownership of the house. Among the reliefs claimed by the Plaintiff was an injunction to restrain the Defendant from removing the house until the trial of the action. In her evidence Mrs. Sandys said that Taniela 'Otukolo removed the house from her land on 7th June, 1956 i.e. after the summons was issued in the case. This evidence was not contradicted by the Defence and the case must be decided having regard to the evidence of what the position was at the date of the issue of the summons i.e. 16th May, 1956, at which date the house was in the possession of the Plaintiff.

There can be no doubt that since the 2nd and 3rd Plaintiff have stated they do not claim that the house belongs to them there must be judgment for the Defendant against them. The

learned trial Judge did however rule that the Defendant had no case to answer even against the 1st Defendant, Mrs. Sandys because there was no evidence that she owned the house.

It is true that there is very little evidence that Mrs. Sandys owned the house and that her case rests almost entirely on the evidence of her possession.

There is however a presumption of ownership arising from mere possession which is set out in the Evidence Act (Chapter 9) Section 109 which reads as follows :--

"Where the question is whether any person is the owner of anything of which he is shown to be in possession the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

It is clear that a person who is in possession of property at the time a summons is issued concerning its ownership is entitled to maintain that possession against everyone save the true owner. Taniela 'Otukolo took possession of the house after the issue of the summons in this case, in which an injunction was sought to restrain him from taking possession until after the hearing of the case. He, or his administratrix, the Defendant in this case, cannot be permitted to obtain any advantage by that act after the action was commenced. The defendant cannot be permitted to retain possession of the house unless she can show that she is the true owner of it. If the Defendant cannot show that at the date of the issue of the writ she or Taniela 'Otukolo whom she represents was the true owner of the house then Mrs. Sandys, who at that date was in possession of it, is entitled to the protection of the Court in maintaining that possession against everyone save the true owner.

For these reasons we are of the opinion that the learned Judge was not correct in ruling, at the close of the case for the Plaintiff in the Court below, that the Defendant had no case to answer in respect of the claim by Mrs. Sandys. The 1st Plaintiff's case rests upon her uncontradicted evidence that at the date of the issue of the summons this house was in her possession and had been in her possession, on her land, since the death of 'Otukolo the original owner of it.

If the Defendant asserts that Mrs. Sandys, the 1st Plaintiff, is not the owner of the house of which she was in possession the onus of proof now rests at the Defendant by virtue of Section 109 of the Evidence Act of proving that the Defendant is the true owner. If the Defendant fails to discharge this onus of proof then Mrs. Sandys is entitled to an order of the Court restoring the house to her or for judgment for a sum of money representing its value at the date of the issue of the summons in this case. For these reasons the Judgment of the Supreme Court must be varied. The judgment for the Defendant against the 2nd and

3rd Plaintiff is affirmed but the judgment against the 1st Plaintiff is set aside and the case is returned to the Court below with the direction that it be reopened and the Defendant called upon to make her defence. Having regard to the fact that the house in question is very old and the two remaining contestants appear to be widows, we venture to express the hope that they will make every effort to discuss the matter with a view to a settlement before they proceed further with this expensive and protracted litigation over an asset of doubtful value. With this object in mind we have decided to order that each side should bear its own costs up to date.