As to the third appellant, he was present at both the important family meetings in which the successor to the late chief was convened. He it was who suggested who the victim should be. He said the deceased child was ugly and he should be sacrificed. After his murder he collected and helped to burn the corpse and after this collected the ashes and sent by a messenger to the soothsayer so that some medicine could be made out of it to enhance the chances of the chiefdom returning to their house. We think he was rightly convicted and sentenced.

The appeal by the first, second and third appellants is dismissed.

Freetown
Nov. 12,
1962

Ames P.,
Bankole Jones
Ag.C.J.,
Dove-Edwin
J.A.

[COURT OF APPEAL]

ENITOR THOMAS AND OTHERS . . . . . *Appellants*

v.

SONNIE SAHR KPEHO AND ANOTHER . . . . . *Respondents*

[Civil Appeal 11/62]

Claim for an Account—Affidavit by first defendant that plaintiffs not entitled to account—No appearance by second defendant—Proper course for judge to follow—Supreme Court Rules (Sierra Leone Subsidiary Legislation, Cap. 7), Ord. 3, r. 8, Ord. 45, r. 1 (c) and (d)—Rules of the Supreme Court (England), Ord. 15, r. 1.

Defendants were the executors of the estate of Joe Thomas (the testator), who died in 1956. On January 22, 1962, plaintiffs issued an indorsed writ against defendants claiming an account of all moneys and securities left by testator, an account of rents and profits and payment to plaintiffs of their respective legacies under testator's will. The writ was issued pursuant to Order 3, r. 8, of the Supreme Court Rules. On February 21, first defendant entered an appearance. Second defendant never entered one. On April 25, plaintiffs applied for an order in terms of the indorsed writ pursuant to Order 15, r. 1, of the English Supreme Court Rules. On May 16, first defendant swore to an affidavit in which he stated that plaintiffs were not entitled to an account. On May 17, the trial judge ruled that there must be an affidavit satisfying him that there was a preliminary question to be tried, and he adjourned the proceeding to May 23 so that the necessary affidavit could be filed. On May 21, third plaintiff swore to an affidavit showing his interest in the estate. At the hearing on May 23, counsel for first defendant argued that the plaintiffs should have proceeded by way of an originating summons pursuant to Order 45, r. 1 (*c*) and (*d*), of the Supreme Court Rules. The judge dismissed plaintiffs' application on the grounds that (1) plaintiffs' affidavits did not state that first defendant had failed to satisfy the judge that there was a preliminary question to be tried, and (2) second defendant had not filed an appearance. Plaintiffs appealed.

Held, allowing the appeal, (1) that the judge, after reading first defendant's affidavit, should have ruled that there was a preliminary question to be tried, and should have proceeded to try it; and

(2) That, if the judge had decided that first defendant was an accounting party, it would have been proper for him to order an account from the second

as well as the first defendant, since second defendant had been served with the writ of summons.

E. Livesey Luke for the appellants.
Alfred H. C. Barlatt for the respondents.

DOVE-EDWIN J.A. This is an appeal by special leave under the Courts Appeal Act, s. 18 (1), of No. 18/1960.

On January 22, 1962, an indorsed writ for an account was issued by the plaintiffs against the defendants for (1) an account of all moneys and securities left by the deceased testator; (2) an account of rents and profits, and (3) payment to plaintiffs of their respective legacies under the will of the testator, Joe Thomas (deceased), and one half-share of rents to the third plaintiff.

On February 21, 1962, the first defendant, through his solicitor, entered an appearance. The second defendant, although he was served with the writ at Bo on February 30, 1962, did not enter an appearance at all and from the records took no part in the porceedings.

The defendants took out probate of the will of the late Joe Thomas on December 1956. The testator's will was dated September 4, 1956. He died on October 7, 1956. The indorsed writ of summons was issued under Order 3, r. 8, of the Supreme Court Rules, which is identical with Order 3, r. 8, of the English rules.

On April 25, 1962, an application was filed on behalf of the plaintiffs by their solicitor for an order in terms of the indorsed writ. This application was to be heard on May 8th, 1962. With this application was filed an affidavit by the first plaintiff alleging that the defendants were the executors of the estate of Joe Thomas (deceased), and the date they took out probate, that they, the first plaintiff, second plaintiff, third plaintiff and 1st defendant, were entitled under the will to the estate. A copy of the will was also filed and exhibited as Exhibit "A."

On May 16, 1962, the first defendant swore to an affidavit in which he admitted that he is one of the executors of the Joe Thomas (deceased) estate. He states that the first plaintiff is not entitled to an account, nor are any of the plaintiffs entitled to an account. There is also an affidavit by the third plaintiff showing his interest in the estate. The application by plaintiffs for an order pursuant to the terms of the indorsement on the writ was not heard on May 8, 1962. It was adjourned to May 11, 1962, and further adjourned to May 17, 1962, when it was heard in part. Counsel for plaintiffs said the application was made under Order 15, r. 1, of the English rules, and, without calling on counsel for first defendant (second defendant did not appear), the learned trial judge said: "There has been no disclosure either in the summons or the affidavit in support to show that the defendants have failed to enter an appearance or to satisfy the judge that there is a preliminary question to be tried after appearance entered. This is necessary for an order on this summons to be made. Adjourned to May 23, 1962, for the necessary affidavit to be filed." The affidavit of the third plaintiff was sworn to on May 21, 1962.

On May 23 counsel for the first defendant submitted (1) that the plaintiffs should have come by way of an originating summons according to Order 45, r. 1 (*c*) and (*d*), of the Supreme Court Rules; (2) that there is no evidence from the documents filed that any of the plaintiffs is the person named in the will exhibited; and (3) that from the will certain provisions are conflicting,

that the proper course would be for an application for the construction of the will and that the application was misconceived.

Counsel for plaintiffs made his submission and urged that the affidavit of the first defendant does not show that there is a preliminary question to be tried, or otherwise does not exclude affidavits of other persons apart from the defendant.

In his ruling the learned trial judge dismissed the application and had this to say:

> "If there had been only one defendant, sufficient would already have been done for me to make the order. But there are two defendants and the second defendant did not file an appearance. So it would, therefore, be necessary for the second leg of the prerequisite condition to granting the order to be supplied.
>
> "The affidavit of the solicitor does not contain the information that the defendant after appearance has failed to satisfy the judge that there is a preliminary question to be tried. As it will be improper to make the order against one defendant only I therefore dismiss the application with costs."

Against this ruling the plaintiffs have appealed to this court. First of all, I think the procedure taken by solicitor for plaintiffs, under Order 15, r. 1, was the correct one. Order 45, r. 1 (*c*) and (*d*), in my view, would not be appropriate in a case for accounts such as this. Order 3, r. 8, of the Supreme Court Rules is identical with Order 3, r. 8, of the English rules. Order 45, r. 1, is identical with Order 55, r. 3, of the English rules. It appears to me that on May 17, 1962, the learned trial judge, after reading the affidavit of the first defendant who had appeared, should have ordered that there was some preliminary question to be tried and should have tried it before deciding whether or not to order the accounts; for he would then have ordered the accounts if he was satisfied that the defendant was indeed an accounting party. Order 15, r. 1, only applies where it is clear that the defendant is an accounting party and that if the matter went to trial an account must be directed.

The affidavit of first defendant sworn to on May 16, 1962, says in paragraph 5:

> "The deponent, that is, first plaintiff, is not entitled to an account of all moneys and securities (if any) Joe Thomas (deceased) died possessed of or entitled to or an account of the rents and profits accruing from No. 3, Caulker Lane, aforesaid."

And paragraph 8:

> "The plaintiffs are not entitled to an account. . . ."

This affidavit raised the question that some preliminary question had to be tried, for if first defendant is correct he would not be an accounting party and so the order for accounts would not be made.

The learned trial judge misdirected himself in his ruling both on May 17 and May 24. The second defendant, who did not enter an appearance or appear at all, is not important, for the order could have been made against him since service of the writ of summons was proved by the affidavit of A. S. Kamara, sheriff's assistant bailiff, dated January 30, 1962.

Learned counsel for first defendant does not seek to support the reason given by the learned trial judge for dismissing the application but he seeks to support the dismissal on other grounds.

In my view, the appeal ought to be allowed and the matter referred back to the trial judge for him to find out the question raised by first defendant in his affidavit whether he is an accounting party or not. When this has been done he would then be in a position to order the accounts or dismiss the application.

C. A.
1962
THOMAS AND OTHERS v. KPEHO AND ANOTHER.

[COURT OF APPEAL]

JAMAE SILLAH . . . . . *Plaintiff/respondent*

v.

JOHN MOIWO . . . . . *Defendant/appellant*

Freetown
Nov. 12, 1962

Ames P.
Bankole Jones Ag.C.J.
Dove-Edwin J.A.

[Civil Appeal 15/62]

Tort—Assault—False imprisonment—Quantum of damages—Alluvial Diamond Mining Act (*Cap.* 198, *Laws of Sierra Leone*, 1960), *s.* 22.

Appellant (a police officer) arrested respondent (a petty trader) at Bombohun near the Liberian border at about 9 a.m. The arrest was made pursuant to section 22 of the Alluvial Diamond Mining Act, subsection (2) of which provides that "Where any person is arrested . . . such person . . . shall, as soon as is practicable, be brought before the nearest magistrate."

Appellant, who had a search warrant, took respondent into a house and searched him, expecting to find some diamonds on him, but found none. Thinking that he must have swallowed the diamonds, appellant decided to take respondent to Bo Hospital in a motor vehicle. On the way to Bo they stopped for petrol at Pujehun, but appellant did not bring respondent before the magistrate there. At about 3.30–4.00 p.m., they reached Bo, where respondent was taken to the hospital and an enema was administered to him without his consent. After being taken to the police station, respondent was taken back to the hospital, where his stomach was X-rayed, and then back to the police station. No diamonds were discovered, and respondent was released.

Respondent brought an action against appellant for assault and false imprisonment. The Supreme Court (Cole J.) gave judgment for respondent, and awarded damages of £600. Appellant appealed on the ground that the damages were excessive.

Held, allowing the appeal, that the judge must have acted on some wrong principle in awarding damages.

The damages were reduced from £600 to £100.

John H. Smythe (Acting Attorney-General) for the appellant.
Samuel H. Harding for the respondent.

AMES AG.P. This appeal is only as to the quantum of damages awarded by the Supreme Court against the appellant for assault and false imprisonment of the respondent.

The matter arose in this way.

Section 22 of the Alluvial Diamond Mining Act, Cap. 198, is (as far as is relevant):

"(1) Any . . . member of the police force may arrest without a warrant any person whom he has reasonable cause for suspecting to have committed, or to be about to commit, any offence against this Act and may seize any