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~~[Draft]~~

CR.APP.11/92

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

NAZIH HASSANYEH — APPELLANT

AND

EUGEMO SATORI — RESPONDENT

CORAM:
Hon Justice Sir John Muria JSC
Hon Justice U.H. Tejan-Jalloh JA
Hon Justice S. Koroma JA

Hearing: 31st May 2006
Judgment: 24 *October, 2006*

Advocates:
B Macaulay Jr and C.F. Edward for Appellant
E.E.C Shears-Moses for Respondent

JUDGMENT

Delivered this 24 **day of** October **2006.**

TEJAN-JALLOH JA: This is an appeal against the Judgment of Hon. Justice F.C. Gbow delivered on the 13th March 1992 in which the learned Judge made the following Orders against the Appellant:

(i) delivery up of possession of the premises ;

(ii) mesne profit;

(iii) be restrained from parting with possession of the premises other

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than to the Respondent.

(iv) pay damages for breach of contract and

(v) pay cost of the action.

The appellant being dissatisfied with part of the Judgment appealed to the Court regarding the delivery up of possession, injunction and mense profit.

The grounds of Appeal are:

1. The learned Trial Judge having found that:

> "(a) This 1990 was he same year in which the Plaintiff's own lease, the Head lease with Government in respect of the land on which these buildings are located was to expire ... ...The plaintiff himself had been a sub Lessee to one Dr. Sitta, who was the original Lessee to Government the lessor of the land. Dr. Sitta's unexpired term had been assigned to the Plaintiff."

> "(b) Since according to the evidence the Plaintiff's term of years come to an end in 1990"

> "(c) There is no evidence that the Plaintiff has exercised his right of option"

Erred in law in ordering, on the 13th March 1992, that the 2nd Defendant

> ".... do delivery up of possession of both houses situate at No. 28 & 28A Horse Shoe Road, Kissy Dockyard."

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"..... that the 2nd Defendant by himself his servants or agents or otherwise howsoever be restrained from parting with possession of the said premises save to the Plaintiff"

in that the Plaintiff no longer had any legal interest and or rights in respect of the said premises after the expiration of same as found by the learned trial Judge himself.

2. The learned trial Judge having reviewed the evidence of the Plaintiff with regard to the latter's instructions to the 1st Defendant that he wanted the revised rent to be in the sum of £5,000.00 (Five Thousand Pounds Sterling) misdirected himself in assessing mense profit when he said

"For any assessment of the mense profits I am going to adopt the amount of £2,500.00 (Two Thousand Five Hundred Pounds) as a fair rent for the dwelling house per annum for the period 1986 – 1990"

in the absence of any evidence whatsoever that such a figure represented the fair value of the said premises for the period in question.

3. The learned trial Judge in assessing mense profit with particular regards to the exchange rate prevailing over a period of time misdirected himself when he stated as follows:-

"With the aid of information obtained from Commercial Bank as well as the Bank of Sierra Leone I am in a position to consider this issue"

in that -

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(a) no such information has been given in evidence during the course of the trial and

(b) The learned trial Judge was acting on information received by him personally which was not "evidence" for the purpose of adjudication on the issue of mense profit.

It is clear from the grounds of appeal that at the heart of this case is the legal status of the respondent's lease over the property in question. It is therefore necessary that the status of the respondent's right to the property concerned must first be ascertained. This is crucial to any claim that he may have against the appellant over the latter's reliance on his subsequent leasehold right in the property.

Status of the Plaintiff's Lease

According to the evidence before the court, the plaintiff was granted a sublease over the property in 1967 for a term of 22 years by one Dr. Sitta who held the head lease from the Government. The sublease was to expire in 1990 which was the same year in which Dr. Sitta's head lease was to expire. However, in or about 1985, Dr. Sitta's unexpired term was assigned to the respondent, thus making the respondent's sublease as well as the head lease expiring at the same time, that is, at the end of 1990. The evidence on this can be found at pages 54 and 55, as well as in "Exh. K and L" at pages 298 and 299 of the Record).

Further it is pertinent to note a very important finding of fact made by the learned trial judge relating to the status of the respondent's lease. His Lordship had this to say, before deciding on the question of mense profit (at page 272 of the Record) :

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"Before however coming to the issue itself I should state that whatever amount that I would arrive at, would be in respect of the period, 1986 – 1990, since according to the evidence the plaintiff's Term of Years came to an end in 1990. Although in his evidence the plaintiff told the Court that Dr. Sitter assigned his lease to him and that the Government gave its approval of the assignment and also an option to renew as stated in Exhs. 'K' & 'A' was given to him, there is no evidence that the plaintiff has exercised his right of option"

As the learned trial judge found, there was no evidence that the plaintiff (now respondent) ever exercised his right of option, although Exhibit "K" showed that he was allowed to do so. The only conclusion is that having not exercised his right of option to renew the lease at the end of 1990, his legal right to continue as a iessee of the property concerned (Nos. 28 and 28A Horse Shoe Road, Kissy Dock Yard) ceased at the expiration of the lease at the end of 1990.

The appellant's Lease

Learned Counsel for the Appellant sought and obtained leave to adduce fresh evidence and such evidence to be by way of affidavit. Such fresh evidence has revealed that on 19th March 1991 a lease of the property, the subject matter of this action was granted to the Appellant and that subsequent to that, by Deed of Conveyance dated 17th day of May 1994, conveyance of the said property was made to the Appellant and it is registered as No.404/94 in Volume 477 at Page 71 of the Book of Conveyances kept in the Office of the Registrar-General. The contention of learned Counsel for the Respondent is that there had been a cancellation of the lease granted to the appellant *vide* Irrevocable Deed dated 9th May, 2001. This now raises the issue of the legality or validity of

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the Irrevocable Deed of Cancellation. Learned Counsel for the Appellant submitted that the purported cancellation is invalid, null and void and of no effect. For this proposition, he referred us to *Halsbury's Laws of England* 3rd edition Vol. II page 365 at Para.593 under rubric "Cancellation Discharge" where the learned author states inter alia:

> *"A deed may lawfully be cancelled either by the person who has it in his possession as being solely entitled thereunder or by anyone (including the party bound by the deed) to whom the person has delivered it up to be cancelled.*
>
> *The deed may be cancelled by mutual consent, or under the terms of an agreement between the parties or by order of the Court."*

It is plain from the evidence, and it is not disputed by the Respondent, that the purported cancellation was not by the Order of the Court. We note the appellant strongly denied being a party or privy to the purported cancellation. We are, of the view that the Appellant's case is strengthened by the fact that his Lease Agreement was still with him and so is his Conveyance in respect of the property. Counsel also placed great reliance on Registration of Instruments (Amendment Act 1964) which made registration of Instrument compulsory. Section 4 as far as relevant reads:-

> *4(i) Every deed, Contract or Conveyance executed after eighteen hundred and fifty seven, so far as regards any land hereby affected shall take effect as against other deeds affecting the same land from the date of its registration."*

In *Dr. C.J. Seymour-Wilson v Musa Abess* (17th June 1981) S.C. Civ. App. 5/1979 (Unreported) the principle was restated that registration of an

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instrument under the law confer priority over other instruments attaching the same land which was registered later. In the case in hand, the Conveyance of the subject matter to the Appellant was prior to the Irrevocable Deed of Cancellation. In the light of the fresh evidence, we have received there can be no doubt that the "Irrevocable Deed" came into existence after the Lessor had already divested himself of title to the property (*nemo dat quod non habet*). We hold that the freehold already granted to the Appellant ~~[holds]~~ remains effective and we see no justification to hold otherwise. We further hold that the Appellant is the one entitled to the possession of the premises subject-matter of this action situate lying and being at No.28 and 28A, Horse Shoe Road, Kissy Dockyard, Freetown. For the foregoing reasons, the order of the learned trial judge as regards delivery up of possession and injunction are hereby set aside.

As regards grounds 2 and 3 of the appeal, the complainants are that the mense profit awarded was without evidence that it was a fair value of the property and that there was no evidence before the Court as to the prevailing rate of exchange at the material time. We find it convenient to deal with these two grounds together.

Mense Profits and Rate of Exchange

The law is settled that mense profits are assessed at the amount of the rent, but if the real value is higher than the rent, then the mense profits must be assessed at the higher value. See *Clifton Securities Limited v Huntley and ors. (1948) 2 All E.R. 283.* At what rate the mense profit are to be assessed would depend on the evidence in respect of it; and the evidence required is one that will tell the Court the market value of the property. It would therefore be wrong for us to subscribe to the learned Trial Judge's view that he could, without evidence, assess the mense

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profit based on information personally known to him. Such a practice amounts to only a conjecture.

We have considered the argument canvassed by both sides. The principal basis for the learned trial judge's assessment of the mense profit in this case was from information obtained and/or available to him from the Commercial Banks as well as the Bank of Sierra Leone. Learned Counsel for the Appellant argued that the exchange rate is not of the matter the Court can take judicial notice of. In support of the proposition he relied on *Phipson on Evidence 11th Edition page 23 paragraph 48 under the rubric "judge or jury as witnesses"* where the law is stated thus:-

> *"Although, however, Judges or Juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life, which men of ordinary intelligence possess they may not, as might, juries formerly act in their own private knowledge or belief (emphasise mine) regarding the facts of the particular case".*

It can be seen here that the learned Trial Judge acted wrongfully by basing his assessment on his private knowledge. The case of *John & Lamin v John 1957-60) A.L.R. S.L., 77 at page 81* also cited by the learned Counsel for the appellant is authority for the proposition that cases before the Court should be decided upon legal evidence. Suffice it to say there was no legal evidence adduced before the Court to support the learned trial Judge's decision on the rate of exchange. The conclusion we have reached is that the decision is bad in law and should be set aside. We therefore set aside the order for mense profit. Grounds 2 and 3 of the appeal also succeed.

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This appeal is allowed. The judgment of the learned Trial Judge dated the 13th of March 1992 and the orders made against the Appellant are hereby set aside.

Costs to be taxed if not agreed.

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Sgd. Hon Justice U.H. Tejan-Jalloh JA

Sgd. Hon Justice Sir John Muria JSC: .....

Sgd. Hon Justice S. Koroma: .....