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CIV APP 5/2009 & CIV APP 13/2009

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: P C MOHAMED KAILONDO BANYA - APPELLANTS

NATIONAL ELECTORAL COMMISSION

PROVINCIAL SECRETARY, EASTERN PROVINCE

MINISTRY OF LOCAL GOVERNMENT & COMMUNITY DEVELOPMENT

ATTORNEY-GENERAL & MINISTER OF JUSTICE

AND

LAMIN VONJO NGOBEH - RESPONDENT

AND

BETWEEN: LAMIN VONJON NGOBEH - APPELLANT

AND

P C MOHAMED KAILONDON BANYA & OTHERS - RESPONDENTS

CORAM:

HON JUSTICE P O HAMILTON, JSC

HON JUSTICE N C BROWNE-MARKE, JA

HON JUSTICE S A ADEMOSU,JA

COUNSEL:

OSMAN KANU Esq for The Appellants in Civ App 5/2009, and for the Respondents in Civ App 13/2009

C F MARGAI Esq (with him, R B KOWA Esq) for the Respondent in Civ APP 5/2009, and for the Appellant in Civ APP 13/2009

JUDGMENT Delivered the 5th day of March, 2010

1. There are two appeals here. The first one, Civil Appeal 5/2009 is brought by P C Banya and others against the Judgment of SHOWERS,J delivered in favour of Mr Lamin Vonjo Ngobeh, on 13 January,2009. The appeal appears at pages 252-254 of the Record. The other is Civil Appeal

13/2009 brought by Mr Lamin Vonjo Ngobeh against the Decision of SHOWERS,J dated 23 February,2009 in the same substantive matter, in which she granted a Stay of Execution of the Orders made in that Judgment, pending the hearing and determination of P C Banya's appeal to this Court. It appears at pages 255-257 of the Record.

2. Early last year, before arguments commenced in Civil Appeal 5/2009 we had overruled Mr Kanu's preliminary objection to the hearing of Civil Appeal 13/2009 that the Appellant in that appeal ought to have first sought Leave from the Court below, or this Court, before filing his appeal, as the appeal was against a Decision which was Interlocutory, since it did not finally decide the rights of the parties. At the time, we were concerned with progress being made, as the issues in the substantive appeal dealt with matters relating to Governance at the Chiefdom level. We think Mr Kanu was right, but as we had no intention of reversing SHOWERS,J's Decision on whether to grant a Stay of Execution or not, we overruled his objection. But we were firmly of the firm opinion that she was absolutely right in Granting a Stay of Execution, and that once she had so decided, the important thing was to get on with the substantive appeal, and not to entertain any diversionary tactics which might delay the most important issue, which is, whether she was right in the Judgment she had delivered.

3. For the record, we wish to point out that the reference in Civ App 13/2009 in sub-paragraph 3a. thereof, to "*...judgment delivered on the 13th day of March,2009...*" is clearly wrong, as the Decision was that of 23 February,2009. And as a pointer for future purposes, where the Judgment delivered, does not involve invoking the Writs of Execution, such as Writs of Fieri Facias and Sequestration, but makes Declarations as to Rights only, the Courts will be loath, as rightly pointed out by SHOWERS,J at pages 179-180 of the Record, to refuse an Application for Stay of execution of the Judgment, where matters relating to governance are involved, be it at National, Governmental, Local or Institutional levels.

4. Our Decision in Civ App /2008 INSTITUTE OF CHARTERED ACCOUNTANTS OF SIERRA LEONE v CAPT (RTD) M F SPENCER, is a case in point. There, the Appellant Institute sought a Stay of Execution of the Judgment of EDWARDS,J compelling the Institute to register

Capt Spencer as an Accountant. The Institute had contended throughout the Trial that he was not qualified to be so registered, and that to comply immediately with the terms of the Judgment, would render nugatory the appeal, as Capt Spencer would be allowed to practise as an Accountant with the blessings of the Institute, and innocent consumers of his service, may not know that his Status as an Accountant was under attack by the Institute. The lower Court had Declared that he had a right to be so registered. In view of what I have said above, we had no hesitation in granting The Stay applied for by the Institute.

5. We have studied SHOWERS,J's Ruling which appears at pages 176-180 of the Record. We agree with her reasoning, and the conclusion she reached. Mr Lamin Vonjo Ngobeh's appeal Civ App 13/2009 is therefore ' DISMISSED with Costs to the Repondents therein. We do not think there is any other Order "*as the justice of the case may demand*" that this Court can make, as prayed for by Mr Lamin Ngobeh in paragraph 5 of his Notice of Appeal.

6. We now turn to the substantive appeal, Civil Appeal 5/2009. It concerns the holding of the Chieftaincy Election in Kailahun. The Appellants say that (1) The Learned Trial Judge (LTJ) erred in Law when she held in her Judgment that the Defendant did not rebut the claim by the Plaintiff that people of lower ages voted at the election nor, did she take cognisance of the fact that the Plaintiff failed to prove that the election was fraught with fraud and multiple voting. There is a reference here to the LTJ's Judgment at page 29. (2) The LTJ erred in Law when she held for the Petitioner that there was (a) high level of unauthorized proxy, (I believe, the Appellant here meant, 'proxies'), multiple voting and rampant impersonation of individual votes without any or any sufficient evidence substantiating these allegations and without the Petitioner proving the said allegations in accordance with the required standard of proof. (3) The LTJ erred in Law when she relied on the Government guidelines as the basis of her Judgment after she had previously held that the said Government guidelines do not have the force of law in the case of C.C. 800/2006 S No. 80 NGANDI TAMBA AMADU SOKOYAMA vs P C SHEKU AMADU TEJAN FASULUKU SONSIAMA III unreported." (4) that the Judgment is against the weight of the evidence.

7. The first thing we have to do, is to find out whether the Appellants complaints are borne out in the Record. Then we shall go on to state the duty of this Court, where it differs with the lower Court on the assessment of evidence led before it, as an appeal to this Court is by way of rehearing. Lastly, we shall state whether the LTJ was right in the conclusions she reached on the evidence, and whether her decisions on points of Law were right, and in accordance with the authorities.

8. Now, Grounds 1 and 2 are not really errors of law: they were findings of fact based on the LTJ's assessment of the evidence. As to Ground 3, what the LTJ said at page 172 was that it would be against public policy for the Court to disregard breaches of these guidelines. She did not really hold that they had the force of Law. It seems to me, that the LTJ grounded her decision on the use by the 3rd Defendant at the trial, of exhibit A, and the non-publication at the time of the election of exhibit B. At page 172, she says, "*.....it is my view that the use of the unauthorised list of chiefdom councillors exh "A" in the conduct of the elections was a serious flaw in the conduct of the elections. I believe the evidence of the Plaintiff that there were multiple voting and impersonation of voters during the election. This was caused principally by the use of the unauthorised list of chiefdom councillors, exhibit "A" as a result of which use there has been an irreparable flaw in the conduct of the election. The elections are therefore declared null and void."* The question for this Court to answer is whether she was right in holding that the absence of the Gazetted list of chiefdom councillors, which necessitated the use of exhibit "A" rendered null and void the elections.

9. Prior to the passing of the Chieftaincy Act,2009 Paramount Chieftaincy elections were governed by the very scanty provisions of Section 5 of the Provinces Act, Chapter 60 of the Laws of Sierra Leone,1960, and by the amendments introduced by Acts Nos.4 and 47 respectively, of 1961. There is no provision in the older Legislation, for the names of the Chiefdom Councillors to be first Gazetted at least three times before the election. It appears from the evidence led at the trial, that this requirement was introduced by a document described as the "Code of Conduct for Chiefdom Administration. Though there are several references to this document during the course of evidence, and in the LTJ's Judgment, it does not appear that was it tendered at any stage.

There is also reference by Mr Margai, during the course of his closing address at page 86 of the Record, to "*Guidelines for elections for Paramount Chiefs and Sub Chiefs.*" Both documents are however attached to Mr Margai's written address, and described as annexure C at pages 89 to 105. Since they relate to matters of fact which were in contention at the trial, I should have thought they would be tendered. All factual evidence which a party intends to rely on in support of his case, has to be led or tendered during the trial, save those matters which of the Court could take Judicial Notice of. Could the Court take Judicial Notice of these documents? Save for Mr Margai attaching them to his written arguments, they are not in any way authenticated. They are unsigned, and undated. They were not shown to any witness, including DW1 the Provincial Secretary, who admitted at page 78, that he had been sent a copy of the code of conduct. Notwithstanding the absence of the document, Mr Margai was allowed to cross-examine the witness at the same page 78 on the contents of a document which was not in evidence.. In answer to one of Mr Margai's questions, DW1 said on the same page: "*...I read the code of conduct. Yes, the contents were within my knowledge as I conducted the election. The names of chiefdom councillors should be gazetted three times. The names of the chiefdom councillors were not gazetted.*" Thus, inadmissible evidence, to wit, evidence as to the contents of a document which had not been tendered, became the centre-point of the Respondent's case, and of the LTJ's Judgment. What, in my view the LTJ should have done, was to have insisted that Mr Margai tender the document in evidence, before he could ask questions relating to its contents of any witness. Admission of inadmissible evidence is a very strong ground for overturning a trial Court's Judgment, notwithstanding the presence of other cogent evidence.

10. To see how this wrongful admission of evidence influenced the eventual outcome of the trial, it was contended by the Respondent, and so found by the LTJ that the apparent failure to publish the names of the chiefdom councillors before the election, vitiated the whole process. At page 172 the LTJ says: "*Now, Counsel for the Defendant has contended that the code of practice and the guidelines are not laws and are therefore not legally binding in their own right and cited authority to that effect. That may well be. ....The Government in its wisdom has formulated these codes of practices and guidelines for the conduct of*

elections of Paramount Chiefs to standardize the procedure. If in the event these codes and guidelines are not complied with rendering the elections suspect and unreliable, surely it would be against public policy for the court to disregard the breaches." The paradoxical situation the Court found itself in, was that in one breadth, it was saying that the non-publication of the electors names in the Gazette, vitiated the whole process; and, in another breadth it was saying, non compliance with the contents of a document which was unsigned and undated, and which had not been shown to have been published as Government Notice, was binding on the Court.

11. I shall now turn my attention to the matter of the Gazette publication. It is accepted by all sides that the Gazette containing the names of the electors is Gazette Number 4 of 21 January,2003. But on page 36 of the publication, i. e. Page 236 of the Record, it could clearly be seen that the revised list Government Notice No. 7, was signed by S S KOROMA District Officer, on 5 August,2002, many months before the election. Sub-Section 3(1) of the Interpretation Act,1971 provides that "Act"....includes any Act, and any order, proclamation, order in council, rule, regulation or bye-law duly made under the authority of an Act, ...or any other legislative enactment, applicable to and in force in Sierra Leone." Sub-Section 3(2) of the Act provides that: "....*Act.....means an Act of Parliament and includes.....(b)orders, proclamations, regulations, and other instruments having legislative effect in Sierra Leone made in exercise of a power conferred by an adopted law.*"

12. On the other hand, Sub-Section 4(1) of that Act describes "*Government Notice" as "a public announcement of a non-legislative character made by a minister or a public officer in the gazette"* It is not a Public Notice (now, since Act No6 of 1999, a Statutory Instrument) which clearly has legislative force. As the list of electors was published as Government Notice No.7, it is clear that it had no legislative character. But the Code of Conduct and the Guidelines, are not, on the evidence, Government Notices. The most that can be said of these is that they are merely Government Policy Statements of a completely non-legislative character.

13. Section 13 of the same Act prescribes how an Act comes into operation. It is deemed to come into operation upon the date of its publication in the Gazette or upon such date as is provided in or under the Act, or in

any other instrument. This provision is repeated in Sub-Section 106(3) of the Constitution of Sierra Leone,1991 save that there, it is not merely a deeming provision. It is categoric: "*An Act signed by the President shall come into operation on the date of its publication in the Gazette or such other date as may be prescribed therein or in any other enactment.*" Further, Sub-Section 13(2) of the Interpretation Act states that "*every Act shall be deemed to come into operation immediately on the expiration of the day next preceding its commencement.*" Both the Interpretation Act,1971 and the Constitution of Sierra Leone,1991 respectively, are silent on when a Government Notice takes effect, or comes into operation.

14. As to Judicial Notice, Section 6 of the Interpretation Act,1971 makes it clear also, that "*Every Act shall be deemed and taken to be a public Act and shall be judicially taken notice of as such unless the contrary be expressly provided by such Act.*" There is no mention of a Government Notice, which means, in Court proceedings, it has to be proved like any other piece of evidence. This may be the reason why, perhaps, Mr Margai tendered it in evidence as exhibit "B".

15. PHIPSON ON EVIDENCE 13th Edition explains the concept of Judicial Notice. At para 2-07 the Learned Editors state that : "*Judicial Notice covers the provisions of the law, which is not a matter of evidence at all, and the acceptance of facts without admission or proof..... matters noticeable may include facts which are in issue or relevant to the issue, as well as the contents of documents and their methods of proof.....*" Notice will be taken of local custom. Judicial Notice will also be taken of notorious facts. But for the principle to apply, the particular piece of evidence which is to be accorded Judicial Notice, must be tendered as such, and the Judge invited to accord it that privilege. The Judgment of the lower Court does not at any stage suggest that the Court considered that the matter of the Code of Custom and the Guidelines were matters which required the invocation of that principle.

16. When both exhibits "A" and "B" are put together, it would be seen that the list which Mr Koroma revised in August,2002 is that which appears in the Gazette. Save for the addition in the Gazette of the names of members of the Luawa Chiefdom Committee, the number of Electors is 1927 in both documents. Both of them commence with "1. Ensa Sovula

Kondorvoh, Regent Chief, Kailahun", and end with "1927 Fayia Sorie, Koryama Town Chief." Notwithstanding this obvious fact, the LTJ held at at page 169 that "*of great importance in my view is the complaint that the list of chiefdom councillors used in the election was exhibit "A" and not the list of councillors contained in the official gazette....the procedure relating to the compilation of chiefdom councillors list is to be found in paragraph 13 of the code of practice for chiefdom Administrations...*". What the Respondent had cleverly succeeded in doing, was to first, tender in evidence, the so-called unauthorised list, and then to give evidence that certain names which appeared in it, ought not to have been there, as they were not in the Gazette. And as the Gazette had not yet been tendered, he was hoping, which hope was fulfilled, that the Court would not look back, and attempt a comparison. All of the Chiefdom Councillors he mentions in pages 57 to 59 of the Record, were named in exhibit "B" as well. For example, when dealing with exhibit "A" the Respondent said at page 57: " *There is a village called Majeima which is about two miles from Potehun from 732-756. From this list there are twenty five councillors. Majeima has a small community of not more than sixty inhabitants. Therefore this village cannot have up to twenty five councillors."* On page 228 of the Record, i.e. page 28 of the Gazette, it is stated clearly that Nos.732-756 were Councillors of Majeima. As the Respondent at no time complained about the names listed in the Gazette, where is the substance in his allegation that the names had been tampered with in exhibit "A"? A noted Justice of Appeal had once noted that the Court should not allow itself to be "bamboozled with an avalanche of evidence." The Respondent clearly succeeded in doing this in the Court below. At the tail end of his evidence at page 62, he slyly tendered in evidence, the Gazette as exhibit "B." Even under cross-examination, Counsel did not advert his mind to the disingenousness of Respondent's insinuations that something fishy had been done to the List, as Counsel for the Appellant was more concerned with challenging him on the allegations of impersonation and the exercise of undue influence by the presence of persons in authority, such as the then Deputy Speaker, Mrs Lavalie.

17. So, the Respondent succeeded in getting the Court below to act on a document which not only, had not been tendered in evidence, but lacked authenticity, and did not have the force of Law. Unless it was tendered as

real, or as documentary evidence, the Court could not take Judicial Notice of it. There is nothing in our Laws which state categorically that a Government Notice only comes into operation when it is published in the Gazette, unlike the case of an Act of Parliament, or a Statutory Instrument. It is an "*announcement of a non-legislative character*" in the words of the Interpretation Act,1971. The Government Notice containing the list of electors for the election in Luawa Chiefdom was clearly revised by Mr Koroma on 5th August,2002 as is shown in exhibit "B". Exhibit "A" was also made in August,2002. There was no credible basis for the Respondent's allegations. To use an analogy, Public Holidays are required by law, the Public Holidays Act, Chapter 58 of the Laws of Sierra Leone,1960, to be Gazetted. But as often happens, as in the case of Muslim Holidays, or even the Holiday last Thursday, the 18th instant, the holidays are announced on Radio, and thereafter published in the Gazette. Does that mean, it was illegal or unlawful for the President to Declare, for instance, last Thursday as a Public Holiday? Similarly, the Master and Registrar regularly publishes by way of Government Notice, the dates for the commencement and closure of the different Criminal Sessions in each year. Invariably, they are published after the opening, or, as the case may be, after the closure of the Sessions. Could it be reasonably be argued, that the late publication means the Sessions to be opened were opened illegally, or that the Criminal Causes which were heard, were heard illegally? I should think not. Again, the Chief Justice is empowered by the High Court, Criminal Sessions Order, 1965 to appoint by Government Notice, Special Sessions of the High Court. Could it be argued that the late publication of the Notice would invalidate the subsequent trial, when it could be shown that the Chief Justice had made the Order on the date stated in the publication? Again, I think not.

18. It is clear from the LTJ's Judgment, that the allegations of impersonation and gerrymandering, by themselves, did not weigh heavily with her. That she was alarmed by them, of course, is shown in her words at page 171: "*Who knows how many other instances of such a nature occurred during the elections.*" What mattered to her as she stated categorically, was the allegation that these irregularities were caused or produced by the use of exhibit "A" which was not a lawfully authorised document for use in conducting the election; that it was a seriously flawed document in that it included unauthorised names; and that the

Gazette having been published after the holding of the election, was of no effect as far as the election was concerned.

19. In this case, there were was a serious error in the finding of facts made by the LTJ, no doubt induced by the duplicity and legerdemain displayed by the Respondent. There were also serious errors in Law, in grounding a Judgment on documents which had not been tendered in evidence, and which did not have the force of Law in any event. I therefore find myself unable to arrive at the same conclusion reached by my Learned Brother, HAMILTON, JSC. I have not dwelt on the specific allegations of voter impersonation and rigging, as these have been adequately dealt with by my brother, ADEMOSU, JA with whose conclusion I readily agree, that the Appeal should be allowed. Also, I have not found it necessary to cite, or to rely on the authorities cited to this Court by both sides, as I believe they are largely irrelevant to the issues as I see them.

20. I would therefore allow the appeal, set aside the Judgment of SHOWERS,J (now JA) in the Court below; DECLARE the paramount Chief duly elected in respect of Luawa Chiefdom, Kailahun District; and Recommend his Recognition by the President. The 1st Appellant shall have the Costs of this Appeal, and of the Court below, such Costs to be Taxed, if not agreed.

HON JUSTICE N C BROWNE-MARKE, Justice of Appeal.

~~February~~ March, 2010.