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Civ. App. 33/2007

IN THE COURT OF APPEAL OF SIERRA LEONE

IN THE MATTER OF THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ORDINANCE

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE IN BANKRUPTCY

BETWEEN:

NESTOR CUMMINGS-JOHN - APPELLANT

AND

CONETH CUMMINGS-JOHN - RESPONDENT

CORAM:

HON. JUSTICE S. BASH-TAQI - J.S.C.

HON. JUSTICE S. KOROMA - J.S.C.

HON. JUSTICE E.E. ROBERTS - J.A.

ADVOCATES:

BERTHAN MACAULAY JNR ESQ. FOR THE APPELLANT

E.E.C. SHEARS-MOSES ESQ. FOR THE RESPONDENT

JUDGMENT DELIVERED ON THE 2nd DAY OF FEB - 2011

ROBERTS, J.A.

The background of this appeal is as follows:

The Appellant, following a Judgment by the High Court in England, had a trustee in bankruptcy appointed by the court. The Appellant was the Respondent's brother and they both shared certain properties some of which were given to them by their late mother, Mrs. Constance Cummings-John. It is alleged that the trustee agreed to sell to the Respondent the share or interest of the Appellant in the properties some of which were jointly owned by the Appellant and the Respondent.

According to Respondent's solicitor, the Respondent ex abundante cautela applied ex parte to register in Sierra Leone the (foreign) Judgment obtained in England that appointed the Trustee in bankruptcy. The High Court in Sierra Leone granted the said order on 5th February 2004 (Nylander, J.). The Appellant applied for the said order to be set aside and by Order dated 3rd

October 2005, the order of 5th February 2004 was set aside by Nylander J. In the order of 5th October 2005, in addition to setting aside the registration of the Foreign Judgment the Learned Judge (Nylander J) made "consequential orders" to wit declaring several conveyances purportedly made under the said order void, including any registration in the "Pipeline". The Appellant then filed a Motion dated 7th December 2005 applying for possession of listed properties and consequential orders following the setting aside of the order of 5th February 2004. The said application was granted by Showers J (as she then was) on 2nd March 2007. By an application dated 7th May 2007 the Respondent(instead of appealing), applied to the High Court (Showers J) for the order of 2nd March 2007 to be set aside alleging inter alia that the same was irregularly obtained and that the order granted possession of properties which were never in the dispute before the Court. By order dated 16th July 2007 the Hon. Justice Showers granted the application and set aside her previous order of 2nd March 2007. The Appellant has filed this Appeal against the order of 16th July 2007.

The Notice of Appeal dated 9th August 2007 contained the following grounds:

1. The learned trial judge having made an order as a result of an application contested inter parties did not have jurisdiction to set aside that order as he purported to do.

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(i) By an order dated 3rd October 2005. Mr. Justice Nylander decided pursuant to Order 29 r 13, that a foreign judgment registered by his order dated 5th February be set aside. He made consequential orders that two sets of properties should be returned to the ownership of the Appellant in the instances where they were already transferred and if in the process of being thus transferred then they were declared void if they were planned to be transferred by virtue of the said registration. The two sets were (a) properties already registered in the Appellant's name and (b) properties willed to the Appellant. The (a) list was 3 George Street (½ share), 46 Bathurst Street, 7 King Street, 45 Sanders Street and 137 Wilkinson Road. The (b) list included 3 George Street, 40 main Road, 15 The maze Tengbeh Town, 127 Wilkinson Road, 17 Blackhall Road. Mays property at Murray town and land at One Cuppa Water. The allegation that the (b) list or items on it were never in the Appellant's possession raised before Mr. Justice

Nylander and rejected by him. It was based on the affidavit evidence of counsel which was unreliable and inadmissible.

(ii) By a Notice of Motion dated 15th December 2005, the Appellant sought an order for possession of the (a) and (b) lists. The Notice of Motion was duly issued and served on the Respondent and he was represented throughout by counsel who filed an affidavit in opposition, repeating the allegation mentioned in (i) above and made representations. This was again based on the affidavit evidence of counsel which was unreliable and in admissible and now the subject of issue estoppel.

(iii) There was ample evidence of the Respondents taking of possession of the various properties from the Appellant in the two affidavits filed by the Appellant in support of the application. In the affidavit sworn on 10th November 2005, paragraphs 1,2,8,9,10,11,12,13,17 18 and the exhibits attached thereto are germane. In the affidavit sworn on 21st November 2005 paragraphs 1 and 2, listing the properties in question and the order of Mr. Justice Nylander are relevant.

(iv) The learned judge ruled that in the absence of challenge she accepted the evidence contained in the affidavit of the Appellant dated 21st November 2005 that the Respondent had wrongly taken possession of 11 listed properties. She ordered that the Respondent hand over possession of the same properties to the Appellant. The Appellant will rely on the presumption of due process (onmia preasumuntur rite esse acta) that all matters necessary for the proper foundation of her order were considered and found by her when she pronounced her order as being "as prayed". The order dated 2nd March 2007 was made pursuant to Order 29 r 13 and was perfectly in order as there was no failure to comply with any rule of procedure or any irregularity.

(v) This was a final order pursuant to which a writ of possession was issued dated 18th June 2007.

(vi) By an application dated 7th May 2007, the Respondent requested that pursuant to order 2 rule 2 the order of 2nd March 2007 be set aside, the third ground being that the order was irregularly obtained in that "the order was obtained for possession

of certain properties without any claim or evidence before the court that the Applicant herein was entitled to them." In his affidavit in support of the Motion the Respondents counsel again repeated the earlier allegation which was unreliable, inadmissible and the subject of issue estoppel. The offending paragraph was struck out. On 16th July the learned trial judge ruled that "I therefore uphold counsel for the Applicant's submission that the Order was irregularly obtained as there was not sufficient evidence before the Court that the Respondent was entitled to possession of all the properties listed in the said Order."

(vii) The appellant will rely on the following proposition of law "As a general rule, except by way of appeal, no court, judge, or master has power to rehear, review, alter, or vary any judgment or order after it has been entered or drawn up respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order."

2. The proceedings under Order 29 r 13 were sui generis. The order for possession was simply a consequential order based on Mr. Justice Nylander's order to set aside the registration of the foreign judgment.

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The Respondent made a submission that there had been a property dispute leading to the award of particular properties to the Appellant and that a formal action for possession had to be made in respect of each property. This is erroneous. The express terms of order 29 r 13 do not so much as require a summary enquiry into these matters. The discretion which was exercised in the orders of the 3rd October 2005 and the 2nd March 2007 is absolute. The discretion was exercised by Mr. Justice Nylander without complaint from the Respondent in his appeal made in 2006.

3. The learned trial judge erred in setting aside the whole order of 2nd March 2007 for 11 properties when the Respondent made no complaint about three of those properties in his application to set aside (and when on the basis of her ruling the learned trial judge found that the Appellant had a claim to nine of the properties on the list).

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(i) The learned trial judge's ruling of the 2nd March was for the Respondent to hand over 11 properties therein listed. The Respondent conceded that he made no complaint about the inclusion of three properties because order numbered 1 in Mr. Justice Nylander's ruling of 3rd October 2005, referred to them specifically.

(ii) In her ruling dated 16th July 2007, the learned trial judge found that the first two grounds in the Respondent's application to set aside the order of 2nd March 2007 wee not made out. She therefore held that a claim to 6 of the properties on the list in her order of 2nd March 2007 were the properties to which orders 3 and 4 of Mr. Justice Nylander's order of 3rd October 2005 referred.

4. Further and in the alternative, there was evidence which not being subject to any challenge by the Respondent was sufficient to justify the ruling made by Mrs. Justice Showers on the 2nd march 2007.

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The Appellant repeats ground 1 (iii) above.

Pursuant to the directions of this court counsel for the Appellant and the Respondent filed synopses or skeleton arguments respectively and also made brief oral submissions in respect of the several grounds of appeal. I shall deal with the grounds of appeal in the manner or sequence in which they were argued by the Appellant.

GROUNDS 1 AND 4

I shall attempt to summarise the arguments of the Appellant (in respect of grounds 1 and 4) as contained in the Appellant's Skeleton Arguments as well as in the oral submissions of counsel. It was submitted by counsel for Appellant that an appeal to this court was by way of rehearing and that this court in exercising its power can proceed with the appeal as if it were being prosecuted in the court as a court of first instance. Further that this Court has power to give any judgment and make any order that ought to have been made by the court below. Counsel submitted that there was ample evidence (before the Judge) of the Respondent's seizure of possession of the listed properties to justify the making of the orders in the order of 2nd March

2007. Counsel referred to paragraphs 1 and 2 of the Appellants affidavit of 21st November 2005 (page 47 in Volume I of the Records), adding that this evidence was not challenged by the Respondent. Referring to properties at 46 Bathurst Street and 7 Kissy Street Freetown (by way of example), Counsel submitted that the Appellant wrongfully took possession of same purportedly under the registered foreign judgment which had been subsequently set aside. Counsel submitted that the orders prayed for were no t challenged by the Respondent and so they were granted "as prayed". Counsel also submitted that the Respondent is estopped by way of issue estoppel from challenging the order of 2nd March 2007 either by way of the application to set aside or in argument before this Court. Referring to the Respondent's affidavit in opposition to the application sworn to on 7th May 2007, Counsel submitted that the Respondent did not challenge the allegations of seizure of possession by the Respondent, and so it was no longer open to the Respondent to raise those maters he ought to have raised in the earlier application. Counsel further submitted that the grounds for applying for the order to be set aside were not substantiated, adding that all the properties listed (in the A and B lists) were before Nylander J when he made his ruling of 3rd October 2005. Counsel also submitted that there was no jurisdiction for the learned trial judge to set aside her own order on the ground that there were insufficient evidence for making the order in the first hearing as the order was granted after a fully contested hearing between the parties.

In opposing grounds 1 and 4, Counsel for the Respondent firstly stated that ground 4 was vague and contained nothing as a ground of appeal. As regards ground 1, Counsel submitted that the learned trial judge has jurisdiction to set aside an order which was irregular. Counsel submitted that the order of 2nd March 2007 was granted on an application based of the order of 3rd October 2005 which never had a list of 9 properties and that this was most irregular. Counsel added that the order of 2nd March 2007 could not give possession of the properties referred to as the issue of possession was never before the Court.

In my view the wording and contents of ground 4 may well be vague but I shall deal with it together with ground 1. In dealing with grounds 1 and 4 of the Appeal, I shall refer to the first part of ground 1 in which the Appellant states:

"1. *The learned trial judge having made an order as a result of an application contested inter parties did not have jurisdiction to set aside that order as she purported to do."*

In this regard it is important for me to examine the above and perhaps determine what circumstances,, if at all can a judge set aside his own order. Of course an order made on an ex parte application may be set aside by the same Judge. But what is the position as in the instant case where the application was heard inter parties and an order given? In Halsbury's Laws of England 3rd Edition paragraph 1665 page 785 it is stated as follows:

"....As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter, or vary any judgment or order after it has been entered or drawn up, respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order. The object of the rule is to bring litigation to finality, but it is subject to a number of exceptions. In certain cases an Act of parliament which alters the law retrospectively gives express power to the court to rescind, vary or grant relief against previous judgments or orders given or made before the alterations.

A court will also treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was dead or a non-existent company.

Similarly, when there has been some procedural irregularity in the proceedings leading up to a judgment or order, which is so serious that the judgment or order in question ought to be treated as a nullity, then the court will also set it aside.

There is no decisive test for ascertaining which irregularities render a judgment void, as opposed to those which render it voidable, but one test which may be applied is whether the irregularity has cause a failure of natural justice. In addition, the court has power to correct clerical or accidental mistakes in judgments or orders,s to set aside certain judgments in default, to set aside judgments obtained by fraud, to rescind a judgment on discovery of new and material evidence, and to set aside consent judgments in certain circumstances.

The above passage confirms that to say a judge cannot set aside his/her judgment or is indeed only a general rule and that there are known and applicable exceptions. The above passage also recognises that there is no decisive test in ascertaining those irregularities that would render a judgment void or violable as the case may be. It may perhaps be safe to say

therefore that the categories or instances that would constitute an exception to the general rule are not closed.

The question one must ask and which I shall attempt to answer here is that do the issues or circumstances in this case constitute an exception to the general rule to warrant the Hon. Justice Showers to set aside her own order of 2nd March 2007?

My first observation is that all the several applications and orders in this matter flow from an initial application to wit Misc. App.F J 2/04 C No.1. It is but only prudent therefore to carefully peruse the order of Nylander J dated 3rd October 2005. (See page 39 of volume 1 of the Records for the entire Ruling). I note that in respect of the application leading to the order of 3rd October 2005, the Notice of Motion which is dated 2nd June 2004 (See page 1 of Volume II of the Records) prayed for the order of 5th February 2004 to be set aside and any other orders that may be just. Curiously this application did not contain a prayer for possession of properties as the case may be, nor was there a prayer for certain instruments to be cancelled or expunged from the Record Books of Conveyances. Indeed there was a further affidavit by the Appellant sworn to on 7th December 2004 (page 19-20 of volume II of the Records. However even in that further affidavit (paragraphs 6 and 7) it was stated that it was filed in support of the orders already contained in the Notice of Motion dated 2nd June 2004. This Motion was not amended. It was therefore curious that Nylander J would grant orders some of which were never prayed for and the motion never amended.

It must be observed further that the Appellant in his affidavit of 9th December 2004 (page 19 – 20 of Volume II of Records) in his application before Justice Nylander, admitted that the Respondent did not take possession of properties at 137 Wilkinson Road and 45 Sanders Street. Furthermore Nylander J in his ruling (at page 40 line 32 of volume I of Records) noted that these two properties were not part of those alleged to have been taken by the Respondent. Indeed the two, properties were not mentioned in the final orders of Nylander J at page 43 of Volume I of the Records. It was therefore most strange for the order of 2nd March 2007 to contain an order for possession of the two properties i.e. 137 Wilkinson Road and 45 Sanders Street. It is not in dispute that the basis for Showers J granting the order of 2nd March 2007 was the contents of the order of Nylander J of 3rdOctober 2005, however, and rather curiously, there was nothing in the order of 3rd October 2005 that even suggests that the Appellant was awarded or granted an order

for possession of the two mentioned properties. I also observe that the 2nd and 3rd orders of the order of 3rd October 2005 are rather vague and difficult to comprehend or interpret. See page 43 of volume I of the Records. The orders read as follows:

> "2. *All other properties transferred by virtue of the Order dated 5th February 2004 are hereby cancelled and shall be expunged as in 1 above.*
> 3. *All properties in the pipeline for transfer by virtue of my Order dated 5th February 2004 are declared void.*"

It is my view that apart from the 3 conveyances exhibited in that application and named in order 1 of the order dated 3rd October 2005, the said order could not be said to refer to any particular instrument of title as the case may be. It is impossible to state with any certainty which instrument(s) were being referred to.

Another issue that I find rather irregular and curious in the order of 2nd March 2007 is the granting possession in respect of ⅔ part or share of 3 George Street Freetown. This order concedes that the Appellant may not be the sole owner of property and that the "⅓part or share" belongs to someone else who is thereby entitled to ⅓ possession. Even if there were three similar structures on the property it would still be unclear as to what 2 properties (equalling ⅔ share or part) the Appellant is entitled to possession. This order without more illustrates how vague, illusory and irregular it was. It was never clear as to who owns or is entitled to possession of what part of share as the case may be. I am at a loss as to how an order for possession of 2/3 part of a property could be executed. Was there a claim or order for partition?. All of the above go to show that the issue of the ownership and/or possession of the several properties were not properly or sufficiently dealt with or brought before the court. The above also confirm that certain orders in the order of 2nd March 2007 could not and ought not to have been made in the manner they were made. It was not clearly shown to the judge which of the properties were owned or partly owned by the Respondent or to which he still retains a claim to sole or part possession. It is my view therefore that the order of 3rd October 2005 did not establish or grant of the Appellant title to all the properties named in the order of 2nd March 2007. I am not suggesting that one could only be entitled to possession when title is established. But surely in this case it could have been of great assistance if all the conveyances or

instruments of title of the Appellant and the Respondent were all put before the Judge. It would have been tidier if the Appellant had brought a separate action for that purpose rather than continue under the Misc. App FJ 2/04 which was instituted for the registration of a foreign judgement. The issue of the will of the parties' mother and the administration of her estate etc must all come in as they would all be of significance. For example the Respondent was still claiming an interest in, if not co-ownership of, 40 Motor main Road Congo Cross. See page 71 of volume I of Re cords. Indeed there was no declaration in the order of 3rd October 2005 or 2nd March 2007 as to the ownership of that property at 40 Motor Main Road Congo Cross. Again I have perused the "witness statement" of the Respondent at page 64 of volume I of the Records. Indeed it is a document filed in proceeding in England but the same forms part of the Records before me and I am therefore entitled to make comments on its contents. This witness statement, together with all of the above, suggests that there was so much more to the ownership of the several properties and consequently their possession that the order of 2nd March 2007 was rather irregular if not inappropriate and premature. The three properties whose conveyances were exhibited and which were mentioned by Nylander J may be exceptions. However I must add that having considered the above issues which I consider to be serious defects, I have come to the conclusion that the order of 2nd March 2007 was irregular and void. The Judge who granted same recognised it as such and thus decided to set it aside.

It is also my view that it would have been better if separate proceedings were commenced rather than coming under the Miscellaneous Application which was for principally the registration and subsequently the setting aside of the registration of a Foreign judgment. I am of the view that the above catalogues a number of issues which, each in themselves and when taken collectively, constitute serious irregularities in the judgment sufficient for it to be set aside by the judge who made same. Indeed Showers J in her order of 16th July 2007 stated that not only was there insufficient evidence for the making of the order of 2nd March 2007 but that the said order was irregular. It is my view therefore that issue estoppel would not operate in the present circumstance of this case. The order of 2nd March 2007 was irregular and void and the same ought not to have been granted. With respect to counsel for the Appellant the submission on issue estoppel could perhaps have been attractive or persuasive if the first order grantedwasvalid.

I have read the case of HENDERSON V HENDERSON [1843] 3 HARE 100 I agree with the dictum of Wigram VC in that case in which he stated

> *".....Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was not..... only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

However Wigram V.C. indeed accepted that the above was a general rule and that there were exceptions to the rule. As I have stated earlier the instant case presents a special circumstance and the issue estoppel does not apply top bar the judge from setting aside her own order. Even if I am wrong I will have refer to and rely on rules 31 and 32 of the Court of Appeal Rule 1985 and deal with that the issue as if this were the court of first instance. In doing so I have carefully reviewed the above evidence in this matter and I am firmly of the view that the order of 2nd March 2007 was irregular and ought not to have been granted and further that the order of 16th July 2007 was regular valid and appropriate. I see no need, necessity or justification for setting aside the order of 16th July 2007.

For the above reasons I hold that grounds 1 and 4 fail.

GROUND 2

In dealing with ground 2 of the appeal I shall here repeat in full my consideration of grounds 1 and 4 above. I must state further that I agree with the dictum of Showers J at page 138 of volume I of the Records to wit :

> "The respondent has argued that one does not need title to sustain an action for possession. That may well be, but an applicant must show that he is entitled to possession of the properties."

There were several instances where it was not established that the Appellant was indeed entitled to sole possession of some of the properties to justify the orders for possession.. The Agreement on page 56 – 59 of volume 1 of the Records which is dated 19th January 1978 listed those properties owned by the Appellant and Respondent respectively. Again the order 2nd March 2007 granting possession of ⅔ part or share of 3 George Street Freetown showed how cloudy the order was. Indeed if the Respondent has some interest or title to some of the properties listed then it must be wholly irregular to give possession entirely to the Appellant. The interest if any of the Respondent must be determined so as not to make or grant exclusive possession of properties to the Appellant only to discover that the Respondent was part /sole owner to same and was thereby entitled to possession.

Fort the reasons stated here and in my consideration of grounds 1 and 4 above I hold that ground 2 must also fail.

GROUND 3

Counsel for appellant here submitted that the Respondent did not complain about three of the properties in his application and so the judge ought not to have set aside her entire order of 2nd March 2007. I shall again repeat all my comments and considerations on grounds 1 and 4 and Ground 2 above. Having come to the conclusion that the order of 2nd March 2007 was irregular it is only prudent that the entire order be set aside The Application by the Respondent (see Page 1 in volume 1 of the Records) was for the entire order of 2nd March 2007 to be set aside. As I have come to the conclusion that the order was irregular and void I cannot justify accepting that some part of it is valid. It would only be just and prudent that the entire order of 2nd March 2007 be set aside. The Appellant may well have an opportunity to come and or approach the High Court properly bringing all the relevant issues for consideration so that a just and regular order may be obtained. I therefore hold that ground 3 also fails.

The appeal therefore fails and I make the following orders:

1. The Appeal as contained in Notice of Appeal intituled Civ. App. 33/2007 dated 9th August 2007 is hereby dismissed.
2. The several reliefs prayed for in said Notice of Appeal are refused.
3. The Respondent shall have the cost of this appeal such costs to be taxed.

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Hon. Justice S. Bash-Taqi - JSC

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Hon. Justice S. Koroma - JSC

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Hon. Justice E.E. Roberts - JA