CIV. APP. 32/2007

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

AMAL TOUFIC HUBALLAH - APPELLANT

AND

CHERNOR SOW - RESPONDENT

CORAM:
Hon. Ms. Justice S. Koroma J.S.C.
Hon. Mr. Justice P.O. Hamilton J.S.C.
Hon. Mr. Justice E.E. Roberts J.A.

SOLICITORS:
C.F. Edwards Esq. for Appellant
Y.H. Williams Esq. for Respondent

JUDGMENT DELIVERED ON THE 23rd DAY OF June, 2011.

HAMILTON J.S.C. My Lords, the plea of judicata is never a technical plea. It is part of our received law by which a final judgment rendered by a competent judicial tribunal with the necessary judicial competent on the merits is conclusive as to the legal rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same cause of action. *In Spencer-Bower a d Turner's* book titled Res Judicate (2nd ed.) at page 9, paragraph 9, the plea is explained thus:

> "Where a final decision has been pronounced by ..... a judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy thereto ..... is estopped in any subsequent litigation from disputing or questioning such

decision on the merits whether it be used as the foundation of an action or relied upon as a bar to any claim."

As to how far interlocutory judgments can give rise to a successful plea of res judicata it has to distinguish between judgments by default (of appearance or defence) and summary judgments under Order 16 of the High Court Rules 2007 (assuming this is regarded as interlocutory) which, if successful, would require a determination of the merits of the case. In New Brunswick Railway Co. v British and French Trust Co. Limited (1939) A.C.1 it was held that a default judgment is binding only as to defence which it has necessarily and precisely decided. The plea of res judicata really encompasses three types of estoppel: cause of action estoppel, issue estoppel in the strict sense, and issue estoppel in the wider sense. In summary, cause of action estoppel should properly be confined to cases where the cause of action and the parties or their privies are the same in both current and previous proceeding. In contrast, issue estoppel arises where such a defence is not available because the causes of action are not the same in both proceedings. Instead, it operates where issues, whether factual or legal have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense) or where issues should have been litigated in previous proceedings but, owing to "negligence, inadvertence or even accident, they were not brought before the Court (issue estoppel in the wider sense), otherwise known as the principle in Henderson v. Henderson (1843) 3 Hare 100. The rationale underlying this last estoppel is to encourage parties to bring forward their whole case so as to avoid a succession of related actions.

As stated earlier, the plea can be invoked in respect of any final judgment delivered by any Court of competent jurisdiction. The aim of res judicata is to prevent those bound by such earlier decisions from seeking to re-open them to prevent an end to litigations. The plea of res judicata can therefore be raised in proceedings in which a party is of the view, and has evidence to support such

view, that the present action before the Court is res judicata. Accordingly if the Court is satisfied that the plea of res judicata has been established, it is to decline jurisdiction and dismiss the said action. This it need be pointed out is not an exercise in technicality, but a proper determination of a fundamental issue going to the jurisdiction of that Court. As Coussey J.A. apply put it in Basil v. Honger (1954) 14 WACA. 569 at 572:

> *"The plea of res judicata prohibits the Court from inquiring into a matter already adjudicated upon. It oust the jurisdiction of the Court. It is clear therefore that a Court will be exceeding its jurisdiction* If it proceeds in a matter that is res judicata". (Emphasis mine).

On the basis of the above exposition on "res judicata" let me now turn to coniser in detail the merits of this appeal.

BACKGROUND

A full background of this matter is needed in considering this appeal. By a Writ of Summons dated 17th October, 2000 the Plaintiff therein who is now the Appellant herein instituted proceedings against the 1st Defendant therein (Abdul M. Bangura) and the Respondent herein as the 2nd Defendant for a Declaration that the Appellant herein is the owner and it is entitled to possession of all that piece or parcel of land and buildings therein situate lying and being at Off Freetown Waterloo Road, Pamaronkeh, Freetown in the Western Area of the Republic of Sierra Leone by virtue of an Instrument dated 25th May 1979 and registered as No.547 at Page 108 in Volume 309 in the Book of Conveyances kept in the Office of the Administrator and Registrar General. By Notice and Memorandum of entry for trial dated 18th September, 2001 the action was set down for trial in which evidence was led and by a Judgment dated 24th January 2002 the said Plaintiff, the Appellant herein was declared the sole owner of the said piece or parcel of land.

By a Writ of Summons dated 8th February, 2005 proceedings were instituted in the High Court by the Respondent herein against the Appellant for a declaration that the Plaintiff is the fee simple owner and entitled to possession of all that piece or parcel of land together with all the buildings erected thereon, situate lying and being at Off Freetown – Waterloo Road Pamaronkoh in the Western Area of the Republic of Sierra Leone demarcated on Survey Plan numbered LS 2093/95 covering an area of approximately 0.0766 Acre in area. The Appellant entered a conditional appearance to the said Writ dated 14th F2005 and a defence was subsequently filed on 8th March, 2005.

By Notice of Motion dated 23rd February 2005 Counsel for the Defendant the Appellant herein prayed for the Writ of Summons dated 8th February, 2005 be set aside. The appellant then raised the plea of "res judicata" which was dismissed and the Learned Trial Judge held that the piece of land claimed in the Writ of Summons dated 17th October, 2000 is now identical with that claimed in the Writ of Summons of 8th February, 2005. He further held that the specifications and demarcations on the land in the Writ of Summons dated 17th October 2000were different from that in the Particulars of Claim in the Writ of Summons dated 8th February, 2005.

By Notice of Motion dated 4th July, 2005 Counsel for the Respondent herein prayed inter alia for the Defence filed by the Defendant herein be struck out as it discloses no reasonable answer to the Plaintiff's Claim and that Judgment be entered for the Plaintiff, the Respondent herein for the reliefs contained in the

Writ of Summons dated 8th February as contained in the Orders dated 16th November, 2005.

It is against this Order dated 16th November, 2005 by the Honourable Justice A.N.B. Stronge J. (as he then was) that this Appellant has appealed against on the following four (4) grounds:

1. That the Learned Trial Judge did not evaluate or failed to properly evaluate the defence of res judicate raised by the Appellant in his defence.

2. The Learned Trial Judge acted on wrong principles in holding that the Appellant did not disclose a reasonable answer to the Plaintiff's claim and is frivolous.

3. The Learned Trial Judge was wrong in law in giving summary judgment for the plaintiff on a claim for a Declaration of title to land.

4. That the Judgment is against the weight of evidence.

In deciding this appeal it is my humble opinion that the most important issue raised by this appeal is whether the matter is res judicata in view of the earlier judgment of Nylander J.

Based on the above grounds of appeal the Appellant now seeks that the Judgment or Order dated 16th November, 2005 be set aside. It is against the above background that I now intend to deal with grounds 1 and 2 together.

GROUNDS 1 AND 2

1. That the Learned Trial Judge did not evaluate or failed to properly evaluate the defence of res judicata raised by the Appellant in his defence.
2. That the Learned Trial Judge acted on wrong principles in holding that the Appellant did not disclose a reasonable answer to the Plaintiffs claim and is frivolous.

The Learned Trial Judge in dismissing the application by Counsel for the Defendant the Appellant herein by Notice of Motion to set aside the Writ of Summons dated 8th February, 2005 said at Page 156 of the records:

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"I have read all the papers filed in the application. I am of the view that the previous action referred to in the Notice of Motion and filed touch and concern a piece or parcel of land not identical with the piece or parcel of land claimed in the current action as can be seen from the specifications and delineations stated in the previous Writ of Summons."

Counsel for the Appellant pleaded res judicata on Ground One as a defence to which Counsel for the Respondent in reply submitted that Counsel ought to have appealed and further submitted that since the subject-matter claimed in the respective Writ of Summons are different as such res judicata could not be pleaded as a Defence to the second action.

On ground 2 Counsel for the Appellant submitted that the principle of estoppel is a reasonable answer to the Plaintiff/Respondents claim in that where a matter has been adjudicated upon it cannot be re-opened there being no appeal in that the Respondent's title deed having been expunged from the Books of Conveyances cannot form the basis of an action. Counsel for the Respondent in his synopsis of argument submitted that the Learned Trial Judge on 23rd February 2005 held that the pieces or parcels of land claimed in the respective Writs of Summonses were separate and distinct from each other and the Court was therefore precluded from raising the issue again in his Defence as the Court had pronounced on the issue as such only an appeal was needed.

In RES JUDICATA 2nd Edition by Spencer Bower and Turner Pages 18 to 19 under the rubric: "The necessary constituents of Estoppel per rem jucatem" it is stated thus:

"*Any party who is desirous of setting up res judicata by way of estoppel, whether he is relying on such res judicata as a bar to his opponent's claim or as the foundation of his own*

and who has taken the preliminary steps required in order to qualify for that purpose must establish all the Constituent elements of an estoppel of this description ..... That is to say the burden is on him to establish (except as to any of them which may be expressly or impliedly admitted) each and every of the following:

(i) that the alleged judicial decision was what in law is deemed such;

(ii) that the particular decision relied upon was in fact pronounced as alleged;

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf.

(iv) that the judicial decision was final;

(v) that the judicial decision was or involved a determination of the same question as sought to be controverted in the litigation in which the estoppel is raised;

(vi) that the parties to the judicial decision, or their privies were the same person the parties to the proceedings in which the estoppel is raised, or their privies, or that the decision was conclusive in rem."

It is therefore clear from the above that the issues that often arises are questions of facts that must be established by evidence by the party that wants the Court to apply the plea of res judicata.

In my humble opinion for the piea to succeed there are five (5) elements to it:

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(1) The parties or their privies are the same in both previous and present proceedings;

(2) The claim or the issue in dispute in both proceedings is the same;

(3) The res or subject-matter of the litigation in the two cases is the same;

(4) The decision relied upon to support the plea of estoppel per rem judicatum must be valid and subsisting; and

(5) The Court that gave previous decision relied upon to sustain the plea must be a Court of competent jurisdiction.

Unless the above pre-conditions are established the plea cannot be sustained. I wish to comment briefly on the legal position of parties as far as this doctrine is concerned. Parties in the subsequent proceeding may be privies to the previous action. Privies in law are those who derive title from and also claim through that party. The legal effect of privy and its exception to the doctrine of natural justice principle, that every man must be heard on legal principles affecting him. The general rule is that no person is to be adversely affected by a judgment in an action to which he was not a party; because of the injustice of deciding an issue against him in his absence. However this general rule admits of two exceptions; one is that a person who is a privy with the parties, a "privy" as he is called is bound equally with the parties, a "privy" as he is estopped by res judicata; the other is that a person may have so acted as to preclude himself from challenging the judgment in which case he is estopped by his conduct. Our Law recognizes that the conduct of a person may be such that he is estopped from relitigating the issues all over again.

The defendant by their notice of motion to dismiss the action on the ground of res judicata, thereby raised the issue of res judicata as a preliminary issue for determination. It is important for the plaintiff to appreciate that it is at the hearing

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of this preliminary trial on res judicata that the plaintiff should produced all evidence to support his view that the matter is res judicata The trial of the substantive second suit cannot commence or proceed unless the defendants plea of res judicata raised as a preliminary issue is defeated by the plaintiff successfully establishing his contention that there was an eariier decision based on the parties or their privies on the same subject-matter.

It is clear from the records at Page 42 in the judgment of Nylander J. in a previous matter in which one of the defendants was Chernor Sow the Respondent herein but nevertheless believes that he can easily reopen the matter in this instant suit which is now on Appeal. The doctrine of res judicata does not permit such re-opening of the matter which has been effectively determined by a competent judicial tribunal such as the High Court. There is therefore no doubt that Chernor Sow a party or privy and the subject matter lying and being off Freetown Waterloo Road, Pamaronkoh in the Western Area of Sierra Leone are the same as those in the earlier case before Nylander J in the High Court. In Wilson v Genet and Wilson 1970-71 ALR 114 at 118 Tambieh J.A. said

> "Although it is settled principle of law that even when a claim has been wrongly decided either on facts or on a pure question of law, the judgment operates as an estoppel by record in a subsequent suit on the same cause of action".

GROUND 3

The Learned Trial Judge was wrong in law in giving summary judgment for the plaintiff on a claim for a Declaration of title to land.

Was the Order/Judgment dated 16th November, 2005 a Summary Judgment or not? Counsel for the Appellant in his synopsis submitted that the said Order/Judgment was summarily given since the Respondent did not lead

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evidence to prove his claim to a Declaration of title for him to be declared the fee simple owner of the land. Counsel for the Respondent in his response as contained in his synopsis submitted that the Appellant was not in default of defence since a defence was filed but that it was struck out relying on Order XXI

Rule 4 of the High Court Rules 1960 (which is similar to that contained in Order 21 Rule 17(1) of the High Court Rules 2007) which provides:

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

It is proper that the Ruling dated 16th November 2005 as contained in Page 157 of the records be fully produced here. It reads:

"It is ordered as follows:-

1. That the Defence filed on behalf of the Defendant/ Respondent dated the 8th day of March 2005 be struck out on the grounds that the said defence does not disclose a reasonable answer to the plaintiff's claim and is frivolous.

2. That there being no defence judgment is hereby entered in favour of the plaintiff as follows:- (1) That the plaintiff is the fee simple owner and entitled to possession of all that piece or parcel of land together with buildings thereon situate lying and being at Off Freetown Road Pamoramko in the Western Area of Sierra Leone demarcated on Survey Plan No. L.S.2093/95 and covered an area of approximately 0.0766 acres in area. (Emphasis mine).

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(ii) That the Plaintiff do recover possession of the....."

In the said ruling it is clearly stated that "there being no defence .....". This in my humble opinion amounts to a summary judgment on the said land matter.

In my humble opinion evidence ought to have been led in the matter since a defence was filed. This was never done and judgment was then entered. Since the defence was struck out without being looked into nor even considered by the Learned Trial Judge.

Having held that the plea of res judicata does apply in this proceeding, I would have no hesitation in upholding this appeal. Since the Learned Trial Judge did not consider the plea which is normally used as a defence to an action, that is a shield and not as a sword. Evidence ought to have been led, accepted and considered before the Judgment was given but this was never done by the Learned Trial Judge.

In view of all that I have said above, I will allow this appeal. It is accordingly allowed and the judgment of the lower court is hereby set aside. This matter is therefore remitted to High Court for a retrial on the merits. Cost to the Appellant against the Respondent assessed as at Le.3,000,000.00.

Hon. Justice P.O. Hamilton J.S.C.

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Hon. Justice S. Koroma , J.S.C.

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Hon. Justice E.E. Roberts J.A.