

MISC APP 4/2012

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

MRS KUMBA GANDI-CAPIO - PLAINTIFF/APPLICANT

AND

SAHR GANDI-CAPIO - 1<sup>ST</sup> DEFENDANT/RESPONDENT

MAI GANDI-CAPIO - 2<sup>ND</sup> DEFENDANT/RESPONDENT

COUNSEL:

J B JENKINS-JOHNSTON ESQ for Plaintiff/Applicant

S JAMIRU ESQ for Defendants/Respondents

CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL

THE HONOURABLE MS JUSTICE VIVIAN SOLOMON, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 5<sup>TH</sup> DAY OF JULY, 2012

THE APPLICATION

1. By Notice Of Motion dated 26 April, 2012 the Plaintiff/ Applicant, hereafter "The Applicant" applied to this Court for several Orders which appear on the face of the Motion paper. She prays that this Court Orders a stay of execution of the Order made by FOFANAH, J on 30 August, 2011 and of the Order made by MUSU KAMARA, J on 19 March, 2012 pending the hearing and determination of the Application herein; that she be granted an extension of time within which to appeal against the Order made by FOFANAH, J on 30 August, 2011; and a stay of execution of the Orders made on 30 August, 2011 and 19 March, 2012 respectively, pending the hearing and determination of the proposed appeal against both Orders to this Court.

APPLICANT'S 1<sup>ST</sup> AFFIDAVIT

2. The Application is supported by the affidavit of the Applicant's Attorney, Nadia Gandhi-Capio Nee Rogers, deposed and sworn to on 26 April, 2012. To that affidavit are exhibited several documents. They are "A", a copy of the Power of Attorney dated 4 February, 2009 given by the Applicant to

the deponent, and duly registered. It empowers the deponent to institute these proceedings. "B" is a copy of the writ of summons issued on 7 July, 2006, and B1 is a copy of the statement of claim in the action in the High Court. There, the Applicant seeks a Declaration from the Court that the property at 12 Boyle Lane, Murray Town is the joint property of herself and of the now deceased 1<sup>st</sup> Defendant (hereafter "1<sup>st</sup> Respondent"). Serry-Kamal & Co entered appearance on behalf of the Defendants, (hereafter "Respondents") on 18 July, 2006 - exhibit C, but did not file a Defence on their behalf. Therefore, by Notice of Motion dated 13 December, 2007, exhibit D 1-15, the Applicant applied to the Court below for Judgment on her claim. This motion was only served on Respondents' Solicitors on the day of the hearing, 18 December, 2007 as could be gleaned from the entry in the way book of Applicant's Solicitors, and from the affidavit of service deposed and sworn to by Applicant's Solicitors' clerk and process server, Sheki Daniel Kargbo, exhibit E. Judgment was given in default and in favour of the Applicant, by SEY, J on 2 June, 2008 - exhibit F. By letter dated erroneously, I believe, dated 11 June, 2008 instead of 11 July, 2008, exhibit G, the 2<sup>nd</sup> Defendant, (hereafter "2<sup>nd</sup> Respondent") was informed that judgment had been obtained against her. There is no indication as to whether it was also served on the 1<sup>st</sup> Respondent, or whether he was already deceased at that point in time. The tenants at the property at Boyle Lane were also sent a copy of the letter. On 30 June, 2008 SEY, J granted Leave to the Applicant to issue a writ of possession against the Respondents for recovery of possession of the property at 12 Boyle Lane - exhibit H page 1. On 4 July, 2008 the Applicant did obtain a writ of possession - exhibit H page 2. As I have pointed out above, there is no evidence that 1<sup>st</sup> Respondent was served with the Judgment, or with notice of the same. As such, Leave should not have been granted the Applicant to issue the writ of possession, as she had not complied fully with the requirements of Order 46 Rule 3(3) of the High Court Rules, 2007.

3. Mrs Nadia Gandi-Capio deposes further in paragraph 8 of her affidavit that the Applicant's family has been living in part of the house at Boyle Lane, and the other part has been rented out to tenants, some of whom have paid rent for the period up to the end of this year. Three years later, in 2011 the Respondents applied to the Court to set aside the



Judgment in default given by SEY, J. On 30 August, 2011 FOFANAH, J set aside that judgment on the ground that the Respondents had a bona fide defence on the merits, to Applicant's claim - exhibit K. Leave was also granted to the Respondents to file a defence out of time.

4. Notwithstanding the setting aside of the judgment of SEY, J, it appears the Respondents were not restored to possession of the property. One of the Orders made by SEY, J on 2 June, 2008 was that *"The Plaintiff is hereby granted Recovery of immediate possession of all the said house, land and premises situate, lying and being at 12 Boyle Lane, Off Murray Town Road, Freetown."* This Order was set aside by FOFANAH, J on 30 August, 2011, which meant that the Respondents who had been dispossessed were entitled to be restored to possession. But since no specific Order had been made in this respect, the Respondents applied to the Court below again for just such an Order, by way of Notice of Motion dated 18 January, 2012. On 19 March, 2012 MUSU KAMARA, J Ordered, inter alia, *"That the second Defendant/Applicant be restored unto premises situate at and known as No. 12 Boyle Lane, Murray Town, Freetown in the Western Area...pending the hearing and determination of this action on its merit....I hereby issue an injunction restraining the Plaintiff/Respondent by herself, agents, assigns, heirs or whomsoever from entering, remaining or interfering with the said property pending the determination of this action on its merit."*
5. Mrs Gandhi-Capio deposes that this Order, made by MUSU KAMARA, J is unfair, unjust and unsupported by law. She deposes further that the Deed of Gift dated 15 August, 2005 on which the 2<sup>nd</sup> Respondent was relying was revoked by the 1<sup>st</sup> Respondent before he died, by Deed dated 24 October, 2007. Copies of the Deed of Gift and of the Deed of Revocation are exhibited as M and N respectively. These exhibits only go to show that this case ought to have gone to trial and that it was not one suitable to be heard ex parte. In our opinion, they raise several triable issues which we shall not deal with at this stage. Another issue, is that during the course of the proceedings in the different Courts, 1<sup>st</sup> Respondent passed away. Yet still, Orders were made as if he were still alive, and a party to those proceedings.
6. Mrs Gandhi-Capio has also exhibited as "O" a copy of her proposed grounds of appeal. It has conflated the complaints against the Orders of both

FOFANA, J and MUSU KAMARA, J. We do not think there is a need to appeal against the Orders made by FOFANA, J on 30 August, 2011. He merely set aside the judgment in default of SEY, J, which he was entitled to do on the facts presented to him, and notwithstanding the arguments canvassed by Mr Jenkins-Johnston as shown in exhibit "J". We agree that there was a three year delay in making the Order, but if the Plaintiff had been seriously aggrieved about it, she would have applied for Leave to appeal against it a long time ago. That she has only done so now, shows that she was spurred on by the Orders made by MUSU KAMARA, J on 19 March, 2012. So long, as she remained in occupation of the property, notwithstanding the setting aside of the judgment of SEY, J, she was content to let things remain as they were. It was only when she was dispossessed by the Order of MUSU KAMARA, J that she decided to do something.

7. Exhibits P1&2 and R are correspondence between the Solicitors on both sides, and Q is one between Respondents' Solicitors and the Police Regional Commander, West, all of which originated after MUSU KAMARA, J had made her Order on 19 March, 2012. Q1 is a copy of the writ of restitution issued at the instance of the Respondents, consequent upon the Order of 19 March, 2012. The last exhibit, S, is an Order made by MUSU KAMARA, J on 26 April, 2012. In it, she grants leave to the Applicant to appeal against her Order of 19 March, 2012 but refuses a stay of execution of that Order. We believe she was right in this respect. If she had granted a stay of execution of her own Order, she would have effectively also stayed execution of an Order made by another Judge, FOFANA, J on 30 August, 2011. We do not think it would have been proper for her to do this. The Plaintiff should have done the right thing, and taken this matter to trial.

## 2<sup>nd</sup> RESPONDENT'S AFFIDAVIT IN OPPOSITION

8. As would be expected, the Application is vigorously opposed by the 2<sup>nd</sup> Respondent, Mai Gandi-Capio, who has filed an affidavit in opposition deposed and sworn to by her on 1 May, 2012. In short, she is claiming that before the proceedings commenced in the High Court in 2006, 1<sup>st</sup> Respondent had given her the property at 12 Boyle by Deed. It was intended for herself and her children. She claims the Deed of Revocation



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made by the 1<sup>st</sup> Respondent, was procured by the Applicant. She explains that she had been travelling to and from Kono to raise money as her husband, 1<sup>st</sup> Respondent was ill. She only learnt about the default judgment obtained against both 1<sup>st</sup> Respondent and herself, on 15 July, 2008. She and her tenants were thrown out of the property in July, 2008. She had received no notice of the judgment. But if I accept that she had been travelling up and down the country, I would also have to accept that process may have been sent to her address in her absence, and they same may have been mislaid by those in occupation in her absence. She claims that she was never served with the notice of judgment. As evidence of this, she points out that the letter wrongly dated 11 June, 2008 was addressed to her at 33 Byrne Lane, when she was actually residing at 12 Boyle Lane. As such, she instructed her Solicitors to apply to the Court to set aside that judgment. This they did by way of Notice of Motion dated 30 July, 2008 - exhibit 7A&B. In addition to the other reliefs she sought, she also applied for recovery of possession of, or reinstatement into the property at Boyle Lane. FOFANAH, J did not grant this Order. For nearly three years, she was out of possession, as FOFANAH, J only delivered his Ruling on her Application on 30 August, 2011. It was for this reason she instructed her Solicitors to file the Notice of Motion dated 18 January, 2012 - exhibit 11 A&B. She wanted possession of the property to be restored to her.

9. Meanwhile, on 1 November, 2011 pursuant to leave granted by FOFANAH, J in his said Ruling, she filed her defence and counterclaim - exhibit 10A. The Applicant filed a Reply and Defence to Counterclaim dated 18 November, 2011 exhibit 10B.
10. She claims also that Applicant's Solicitors did not bother to file an affidavit in opposition to her Application of 18 January, 2012. Instead, Applicant's Counsel sought adjournment after adjournment until MUSU KAMARA, J delivered her Ruling on 19 March, 2012. She makes several other claims in her affidavit which we do not find necessary to dwell on. The letters exhibited by her as 16A, B&C are dated 12 April, 2012 and could be self-serving, and have no bearing on these proceedings. Finally, she claims that the Applicant has failed to pay her the sum of Le1.5million being Costs awarded her by MUSU KAMARA, J, a matter which could be dealt with by her Solicitors.

APPLICANT'S AFFIDAVIT IN REPLY

*Handwritten initials*

11. The Applicant's Attorney, Mrs Gandhi-Capio deposed and swore to an affidavit in Reply to the 2<sup>nd</sup> Respondent's affidavit, on 21 May,2012. Most of it is concerned with the manner in which execution of the Order of MUSU KAMARA,J was carried out. There is also a lot of finger-pointing and accusations of wrong-doing on the part of the 2<sup>nd</sup> Respondent and her advisers, some of it rather intemperate in tone. This Court frowns on the use of intemperate language in affidavits.

INTERIM ORDER & PROPOSALS FOR FUTURE OCCUPATION OF PROPERTY

12. At the close of the hearing on 4 June,2012 we invited Counsel on both sides to submit proposals as to the future occupancy of the property, as we were of the view, that irrespective of whatever Orders we might eventually make, it was our considered opinion that the action in the High Court should proceed to trial. There are too many contentious issues involved for such an action to be disposed of by way of default proceedings. There and then, we made an interim Order that the property at Boyle Lane should not be sold nor leased until the determination of this Application. On 7 June,2012 Applicant's Solicitors filed the Applicant's proposals which were contained in an affidavit deposed and sworn to by her on 7 June,2012. For her part, the 2<sup>nd</sup> Respondent deposed and swore to an affidavit on 8 June,2012 in which she stated that she could not live with the Applicant in the same building, and did not therefore submit any concrete proposals.

13. Our concern, is to maintain the status quo until the trial is concluded. As I have stated above, we are not inclined to grant the Applicant an extension of time within which to appeal against the Order of FOFANAH,J dated 30 August,2011. As we are at the end of the hearing, and as we are not going to grant an extension of time within which to appeal, we cannot therefore grant the Order prayed for in paragraph 2 of the Applicant's Application. As regards the fourth Order prayed for, we note that MUSU KAMARA,J did on 26 April,2012 grant the Applicant Leave to Appeal against her Order of 19 March,2012. We invited proposals from Counsel because we were of the view that we could not grant a blanket stay of execution of the Order of 19 March,2012, as



prayed for by the Applicant in paragraph 4 of her Application. We do not need to stay execution of the Orders made by FOFANAH,J on 30 August,2011 because those Orders were intended to push the action on its way to trial.

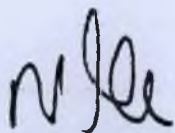
14. The problem with the Order made by MUSU KAMARA,J on 19 March,2012 is that she has restored the 2<sup>nd</sup> Respondent to full possession of the entire premises though the Applicant claims she has tenants occupying the same. We therefore have to take into consideration that whatever Orders we make might affect persons who are not before this Court, and who are not represented in this Court.

15. We therefore make the following Orders:

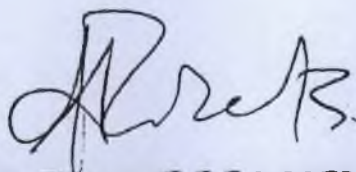
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- (1) The Application made by the Applicant for an Extension of time within which to apply for Leave to appeal against the Order of FOFANAH,J dated 30<sup>th</sup> August,2011, is refused.
- (2) The parties, shall, if they have not already done so, comply fully with the Orders numbered 2,3 and 4 respectively, made by FOFANAH,J on 30<sup>th</sup> August,2011. They shall ensure that the trial commences at the earliest possible time.
- (3) The Orders made by MUSU KAMARA,J on 19 March,2012 are stayed in the manner and to the extent set out in subparagraph (4) below.
- (4) Until the determination of the action at the trial, the property situate at and known as 12 Boyle Lane, Off Murray Town Road, Freetown shall be occupied in the following manner:
  - (i) The Applicant shall be entitled to occupy the top floor of the main building, together with members of her family only. She is not permitted to part with possession of, or, to let out that floor until the determination of the action in the High Court, or, until further Order of this Court.
  - (ii) The 2<sup>nd</sup> Respondent shall be entitled to occupy the middle floor of the main building, together with members of her family only. She is not permitted to part with possession of, or, to let out that floor until the determination of the action in the High Court, or, until further Order of this Court.

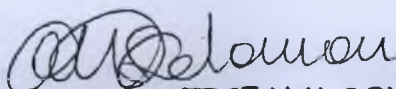
- (iii) If this has not already been done, the ground floor shall be let out to tenants, and the rent paid into Court.
- (iv) If this has not already been done, the out-building or out-buildings shall be let out to tenants, and the rent paid into Court.
- (5) The names of the existing tenants, if any, and the rent paid by each of them shall be filed in the High Court by their respective Landladies.
- (6) In the case of rent paid into Court by any existing or new tenant, the Applicant and the 2<sup>nd</sup> Respondent shall be at Liberty to apply to the High Court for payments out to be made to either of them pending the determination of the action in that Court.
- (7) There shall be Liberty to Apply for the purpose of clarifying or for giving effect to any of the Orders made above.
- (8) Each party shall bear its own Costs.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL



THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL



THE HONOURABLE MS JUSTICE V M SOLOMON, JUSTICE OF APPEAL