CIV APP 41/12

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

DR NATHALIE KOTO ELEADY-COLE - 1ST APPELLANT

ROSE NINI CHAMPION - 2ND APPELLANT

AND

ROSE MARIE MARKE - RESPONDENTS

NATHANIEL MARKE

MARIETTA MARKE-QUINN

FERNAND MARKE

SAMUEL MARKE

MOIRA MURRAY

COUNSEL:

Y H WILLIAMS ESQ for Appellant

I SOURIE ESQ for 1st and 2nd Respondents

R B KOWA ESQ for 3rd, 4th, 5th, 6th and 7th 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 10th DAY OF JULY,2012

1. This is an appeal brought against the Judgment of SHOWERS,JA dated 7 October,2010, by Dr Nathalie Koto Eleady-Cole, in her own personal capacity, and, together with Rose Nini Champion as Administratices of the estate of Rosetta Harris. The 1st Respondent Rose Marie Marke, is also the 2nd Respondent in her capacity as Administratrix of the estate of her late mother, Jeanne Rosemarie Marke. The substance of the appeal is that the trial Judge, SHOWERS,JA was wrong in holding that the Appellants had not instituted the proceedings in the Court below by the proper method, viz: by Writ of Summons, as there were several contentious issues which could not be dealt with adequately by Originating Summons. At the end of her Judgment the Learned Trial Judge had this to say: "....*In the light of the above, I agree with the*

submission of Counsel for the 1st Defendant that there are contentious issues here necessitating that the proceedings should be begun by writ. The Application is therefore struck out with Costs to be taxed." It seems to us, the Learned Trial Judge was here saying that she had no jurisdiction to try the action because it was begun by the wrong method. She did not decide any of the contentious issues which she said had arisen. This is why perhaps, she struck out the Plaintiffs' claim, and did not dismiss the same. She was saying in effect, you were wrong to use this procedure; you must use the correct procedure. We shall therefore confine ourselves to this issue alone in our Judgment, notwithstanding the weighty written submissions filed by Counsel representing the several interest groups. This case concerned the respective estates of Rosetta Harris and Jeanne Rosemarie Marke. It also concerned, to a certain extent, the estate of John Harris, though, as the Learned Trial Judge commented at the end of her Judgment, the Grant made in respect of his estate had not, before arguments closed, been exhibited in Court. But that was an omission which was not fatal, as it could have been made good simply by exhibiting it to another affidavit. But, in the result, SHOWERS,JA did not decide whether she should grant the reliefs sought in the Originating Summons, and this is why she merely struck it out.

2. This Court has to determine also, whether she was right to strike out the Originating Summons. The circumstances in which a pleading could be stuck out, are circumscribed by and in Order 21 Rule 17(1) of the High Court Rules,2007 (hereafter HCR,2007). Sub-Rule (2) reserves the inherent jurisdiction of the Court to strike out pleadings. And Sub-Rule (3) applies this Rule to Originating Summonses. But none of these Rules would apply in this case, as no Application was made by the 1st and 2nd Respondent to the Court for the Originating Summons to be struck out.
3. One of the arguments canvassed by the 1st and 2nd Respondents' Counsel is that the Originating Summons did not bear in its title any statute pursuant to which the Application was being made. This, we surmise, is a reference to Order 5 Rule 4(2)(a) HCR,2007 which states that *"Proceedings- (a) in which the sole or principle question at issue is or is likely to be one of the construction of an enactment or of any deed, will, contract or other document or some other question of law; .....are*

appropriate to be begun by originating summons....." Since the proceedings were instituted by the 1st Plaintiff both in her personal capacity, and in her capacity as one of the Administrices of the estate of Rosetta Harris; and 1st and 2nd Respondent was sued both in her personal capacity, and in her capacity as Administratrix of her late mother's estate, one may safely assume, no one was fooled, or deceived or misled by the absence of a reference to any statute in the title of the action. No prejudice was caused to any other party.

4. As we have stated above, SHOWERS,JA did not go into the merits of the contesting claims made principally by the Plaintiffs on the one hand, and the 1st and 2nd Defendant on the other. She recognised and acknowledged that there were contentious issues between them, and this recognition and acknowledgement formed the basis of her decision. Our duty is to decide whether she was right in striking out the Originating Summons for the reasons she gave.
5. Dr Marcus-Jones argued in the Court below that the Plaintiffs had not produced any Grant made to any person in respect of the estate of John Harris. The 1st Plaintiff did say, in her answer to one of the interrogatories posed by Dr Marcus-Jones - page 96 of the Record, that he died intestate in 1934 and that Letters of Administration in respect of his estate were granted to her mother Rosetta Harris, by the High Court of Sierra Leone in its Probate jurisdiction on 31 May,1934. She did not have a copy of the Grant. Since neither Dr Marcus-Jones nor any other party has produced, in the Court below, or in this Court a Will, or Probate of a Will, we can assume for present purposes that John Harris did die intestate. If Dr Marcus-Jones had a will in his possession, or had knowledge of a Will made by John Harris, it was his duty, in our view, to have made this known to the Court, as he owed a duty to the Court to make known all facts in his possession, a duty he roundly reminded Mr Williams of at page 109.
6. If we accept therefore, that there was no evidence before the Court below that John Harris died testate, then he must be taken to have died intestate. If no Grant was obtained to his estate, that is an omission which could be corrected by the persons entitled to a Grant. It is not an incurable omission. And if he died intestate, the disposition of his estate would have been governed in 1934 by the Intestates Estates Ordinance,

Chapter 104 of the Laws of Sierra Leone,1925 which provided that the Curator of Intestates Estate, the precursor of the Official Administrator in The Administration of Estates Act, Chapter 45 of the Laws of Sierra Leone,1960, (hereafter, Cap 45) passed into Law in 1946, and the Administrator and Registrar-General in 1972, by the Administration of Estates (Amendment) Act, 1972 – Act No 19 of 1972. Section 11 of the then Cap.104 provided that: "*Whenever any person shall hereafter die, being at the time of his decease seised or possessed of, or otherwise entitled to, any land within the colony, and shall not by his will have disposed of such land, then such land shall, instead of descending to his heir-at-law as heretofore, pass to, and become vested in the curator of intestate estates.*" The estate was divested, as is the case in Section 9 of Cap. 45, when the next-of-kin obtained a Grant from the Court. Of course, at the time both Rosetta Harris died in 1963 and Jeanne Marie Marke in 1981, the governing Act, was Cap.45.

7. It follows that the absence in the title of a reference to Cap.45 did not mislead anyone, nor did it deprive the action of its being described as one in which, in the words of Order 5 Rule4(2)(a), "...*the principal question at issue is or is likely to be one of the construction of an enactment.*" Our view is that the omission did not render the proceedings void nor voidable; nor was it an incurable irregularity. We have moved away a long way from the days when the omission of a particular word or phrase, or the wrong spelling of a name could result in the dismissal of a litigant's claim.
8. The manner in which contentious Probate proceedings may be brought is well established in Order 55 HCR,2007: they must be begun by writ of summons. This was not a contentious probate matter in the terms of that Order. This action was brought pursuant to Section 21 of Cap.45. It states that: "*No land forming part of the estate of an intestate shall be sold by the Administrator and Registrar-General or any administrator without the consent of all persons beneficially interested, or the order of the Court or Judge thereof for that purpose first obtained.*" It is clear that '*in Court*' in any legislation usually means by Notice of Motion, and '*Judge*' usually means by Summons in chambers, unless the contrary is stated. So, as far as the sale of the property was concerned, an Order in this respect could be sought by way of Summons in chambers. Also, as

was pointed out to us by Mr Yada Williams during the course of argument, Section 23(1) of Cap 45 sanctions the use of a Summons, where the "*Administrator or any person claiming any title, right or interest in the estate of a deceased intestate (applies) by Petition to the Court or by Summons to a Judge in Chambers, for directions in any question respecting the possession, custody, control, management or disposal of any property forming part of the assets of a deceased intestate.*" But we would here issue this caveat, that "*Summons*" in Section 23(1) of Cap.45 actually refers to a Judge's Summons in Interlocutory Applications, and not to the originating process known as an Originating Summons.

9. As to "*....construction of an enactment.....or other document...*" in Order 5 Rule 4(2)(a) HCR,2007, Cap 45 is indeed an enactment, and one of those which required determination in the Court below; and so also the two Grants, which fall within the category of "*document*". As to the distribution of the property, this may fall within the category of "*...some other question of law....*" in Order 5 Rule 4(2)(a) HCR,2007.
10. The problem arose, we believe, because paragraphs (a) and (b) of Rule 4(2) HCR,2007 were construed conjunctively, instead of disjunctively. If the conjunctive word, '*and*' had been used, Dr Marcus-Jones's argument would have carried the day; but the disjunctive '*or*' was used. In the Concise Oxford Dictionary, 'disjunctive' is described as: "*involving separation; disjoining.....expressing a choice between two words etc., e.g. or in asked if was going or staying.....expressing alternatives.... a disjunctive conjunction.....*" And as TAMBIAH,JA made clear in the leading criminal case of LANSANA v R [1970-71] ALR SL 187, CA, the use of the word '*or*' instead of '*and*' meant two ways of committing the offence charged, and if both ~~were~~ ways were charged in one Count in the Indictment, the Count immediately became duplicitous. In the case of Rule 4(2)(a)&(b) HCR,2007, only one or the other criterion needed to be satisfied in order to bring proceedings by way of Originating Summons, rather than both. Another point which eluded the Court, was that this Rule is merely permissive: it permits proceedings to be brought by a certain method. It does not dictate that a certain method is the only way proceedings could be brought. If it had done so, the Court would have had to go on to consider the provisions of Order 2 Rule 1(3) HCR,2007 which state that: "*The Court shall not wholly set aside any proceedings or the*

writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by originating process other than the one employed." The Court below evidently did not advert its attention to this safety net. The old way of doing things, of, in the words of the Supreme Court Practice,1999 paragraph 2/1/3 at page 10, "*..mindless adherence to technicalities in the rules of procedure...*" are no more with us. The Court's concern should be to ensure that injustice is not caused to a party by such mindless adherence.

11. We have examined the arguments put forward by both sides. We do not think there was any substantial dispute of fact, which was so complex as to warrant a full scale trial commenced by writ of summons. The position on all sides was made clear in the affidavits filed. The Plaintiffs had conceded that Nini Champion was no longer entitled to share in the estate of John Harris, the main bone of contention between the Plaintiffs and the 1st and 2nd Defendants. We think this was quite a significant development, and that it narrowed down the issues in contention. The only issues left before the Court, in our view, were whether or not to grant the Order to sell the property, and to decide the proportions in which the proceeds of sale were to be divided.
12. We have read though the synopses filed by Solicitors on all sides, and we have listened carefully to the arguments of Counsel in Court. We wish to commend Mr Sourie for the adroit and skilful way in which he deployed his arguments, but we are not persuaded by them. We do not believe that all of the matters highlighted in paragraph 20 (a) to (m) of Marcus-Jones & Co's synopsis could not be dealt with by the Court by way of affidavit evidence. We have to remember that those who would have been the principal protagonists in this matter, are long since deceased. Rosemarie Harris, the grandmother of the Respondents died 93 years ago. Nathaniel John Harris their grand-father, has been dead this past 78 years. The Appellants' mother died nearly 50 years ago. Jeanne Rosemarie Marke, the mother of Respondents, died in 1981, 31 years ago. None of them can give evidence, or shed light on any of the facts in issue in this dispute. The relevant facts can only be attested to by the present protagonists presently engaged in the duel in this Court, and were so engaged in the Court below.

13. We have also studied very carefully the Judgment of VIVOUR,JSC in Sup Ct Civ App 6/2006 - AIAH MOMOH v SAHR SAMUEL NYANDEMOH - Judgment delivered 9 June,2008. That Judgment was based on the old Rules. The 'safety net' provided in Order 2 Rule 1(3) HCR,2007 was not available to the Respondent in that case. It is our view that the 'safety net' provided by that Rule, makes all the difference, and it ought to have been considered by the Court below.
14. We now come to the Reliefs sought by the Appellants. We have given this matter considerable thought, and we have come to the conclusion that we can only grant reliefs numbered i & ii in the Notice of Appeal dated 18 October,2010. We do not think we should grant the reliefs prayed for in paragraph iii pursuant to the powers given to this Court by Rules 31 and 32 of the Court of Appeal Rules,1985. We think those reliefs could only be given by the Court below, if the evidence before it, and the justice of the case so require.
15. WE THEREFORE ORDER as follows: The Appellants' appeal against the Judgment of the Honourable Mrs Justice A Showers, dated 7 October,2012 is allowed. The action intitled: MISC APP 12/10 2010 C No. 3 - DR NATHALIE KOTO ELEADY-COLE v ROSE MARIE MARKE & OTHERS is remitted to the High Court for continuation of the trial or hearing. 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.