

IN THE COURT OF APPEAL OF SIERRA LEONE  
(GENERAL CIVIL DIVISION)

BETWEEN: -

EYAMIDE JONES-HARDING      - PLAINTIFF  
(Administratrix and Beneficiary of the  
Estate of SAMUEL THEOPHILUS JONES  
(Deceased)

AND  
ADE E. S. PALMER                      DEFENDANT  
(Attorney for ARTHUR S. JONES-DOVE)

E. E. C. Shears-Moses Esq. for the Plaintiff  
R. Johnson Esq. for the Defendant

RULING DELIVERED THE 26<sup>th</sup> DAY OF March 2014

The Defendant in this action has filed a Judges Summons dated 1<sup>st</sup> November 2013 seeking the following Orders.

1. That this Hon. Court dismisses or strikes out the Originating Summons dated 10<sup>th</sup> October 2013 in that the same is an abuse of the process of the Honourable Court
2. Further and/or in the alternative that this Hon. Court dismisses or strikes out the Originating Summons dated 10<sup>th</sup> October 2013 in that the issues contained in the same for determination by the Hon. Court have already been adjudicated upon by the High Court.

3. That the Hon. Court makes any further or other Orders as it may deem fit in the application herein.
4. That the costs of this action be borne by the Plaintiff/Respondent.

In support of the application is the affidavit of Ade E. S. Palmer, Attorney for the Defendant sworn to on 1<sup>st</sup> November 2013. To the said affidavit is exhibited a copy of the judgment of the High Court dated 11<sup>th</sup> April, 2013 delivered in favour of the Defendant herein in an action instituted against him by the Plaintiff and her brother **OLA JONES**. He deposed that both Plaintiffs have since the judgment was delivered not appealed against the said judgment and that he has been advised by his solicitors that the issues for determination in the Originating Summons dated 10<sup>th</sup> October 2013 herein have already been decided by the High Court. Furthermore he has also been advised that the proceedings begun by the Originating Summons are an abuse of the process of Court.

The deponent further deposed that neither he nor the said **ARTHUR JONES DOVE** plan to or have attempted to sell the property situate at Fourah Bay Road, Freetown which forms part of the estate of **SAMUEL T. JONES** (Deceased). That the Plaintiff is occupying part of the said premises at Fourah Bay Road and is not paying any rent therefor. Counsel for the Defendant drew the court's attention to the reliefs prayed for in the Originating Summons and submitted that they are a collateral

attack on the judgment of the court and that for the action to continue would tantamount to an abuse of the process and thereby bring the administration of justice to disrepute.

Counsel contended that the first two questions set out in the Originating Summons have already been dealt with in the said judgment and that nowhere in the said judgment did the Hon. Judge pronounce the last Will and Testament of **SAMUEL T. JONES** (Deceased) void. He maintained that the Hon. Judge had proceeded to determine the rights of the parties to the action which included those of the Plaintiff based on the said Will of the said Deceased. He argued that she could not have done so had she held the Will to be void.

Counsel further submitted that the Judge having determined the rights of the parties in the said judgment obviates the issues which the Plaintiff seeks to be determined in the first and second questions.

With regards the grant of Letters of Administration obtained by the Plaintiff counsel for the Defendant submitted that she has no capacity to do so and that she cannot do so in view of the subsistence of the Will of the said Deceased.

Counsel further pointed out that the Plaintiff in her Originating Summons has prayed for the Defendant to render an account of the estate and but that that same relief had been prayed for and had been dismissed.



Counsel relied on a number of authorities in support of his submissions and prayed the court dismiss the application.

Counsel for the Plaintiff in reply to these submissions pointed out that the issue of res. Judicata arose and that issue estoppel is one of the factors in which res Judicata would apply. His contention is that the Plaintiff is a beneficiary of the estate of the said **SAMUEL T. JONES** (Deceased) and therefore cannot be denied her right to bring an action against an executor named in the Will of the said Deceased.

I believe the issue here is whether or not the questions posed in the Originating Summons have already been dealt with and adjudicated upon by the High Court. .

Counsel for the Plaintiff averred that those questions were never before the court and were therefore not determined by the said Court. He opined that in those circumstances the issue of res judicate cannot arise.

It is therefore necessary to consider what issues were determined by the court. In the first instance the court made pronouncement on the Will the document on which the whole action turns.

The learned trial Judge stated at page 12 as follows

*"In the instant case the Will is registered but no probate has been granted by the High Court to the Defendant. Therefore a fortiori, no valid title of the estate has passed unto him as the said Will is not proved as required by law."*

The learned Judge fully considered whether the Plaintiff and her brother are beneficiaries of the estate and their entitlement thereto if any under the terms of the Will. She could therefore not have held the Will to be void because it was not registered within time. The learned Judge did go on to conclude that

*"The law requires that for probate to be taken of a Will it has to be registered and until it is registered probate cannot be taken out, therefore the process of certifying that the Will is valid has not been performed and no benefits or powers can be derived from such a Will. The Defendant has not proved the Will which is the only way his title can be confirmed."*

The said learned Judge then proceeded to dismiss the Plaintiff's claim as well as the counterclaim of the Defendant, who had prayed for recovery of possession of the portion of the premises occupied by the Plaintiff.

Counsel for the Defendant has submitted that the Originating Summons is a collateral attack on the judgment of the Court dated 11<sup>th</sup> April, 2013. He maintained that the Plaintiff has not appealed against it and for this court to allow the action to continue would tantamount to an abuse of the process of the court.

The question therefore is do these findings of the learned trial Judge obviate the issues which the Plaintiff seeks to be determined as counsel for the Defendant has canvassed?

It is correct that the learned Judge has not declared the Will void for having been registered out of time. Her Ladyship in her judgment did hold that the said Defendant has not got title to the estate as he has failed to take out probate. It is therefore my view that these findings of the Learned Judge are sufficient to give satisfactory answers to the questions posed by the Plaintiff.

Having said that, the issue which should now be considered is what happens to the estate, in this circumstance where the Executor named has not taken out probate to enable title to pass to him.

Counsel for the Plaintiff submitted that in such a case a beneficiary named in the Will is entitled to take out Letters of Administration which the Plaintiff as a beneficiary of the estate of the Deceased has done. Counsel for the Defendant on the other hand argued that whilst the Will subsists the beneficiary has no capacity to take out such a grant.



Let me say that I have perused the affidavit of the Plaintiff made in support of the Originating Summons. Paragraph 9 thereof states that the Plaintiff took out letters of administration to safeguard the estate in the interest of all the beneficiaries, the Will having become void. With all due respect to the Plaintiff, the Will has not been declared void by the court and it therefore still subsists.

In **Halsbury's Laws of England** 4<sup>th</sup> ed, Vol. 17 at paragraph 712 under the rubric "General and Special executors", it states as follows

*"In the ordinary course a person is appointed executor indefinitely and is therefore charged with the administration of the whole will and of all the testator's property."*

Counsel for the Defendant is therefore correct in his submission that the Plaintiff has no capacity to take out a grant of letters of administration whilst the Will subsists and the executor is alive and has not renounced the appointment.

Now the Plaintiff has deposed in her affidavit in support that she took out the Letters of Administration to safeguard the estate in the interest of all the beneficiaries. Indeed, the practice in a case where an executor fails to or refuses to take out probate is that a beneficiary may apply for a grant of letters of administration but with the Will annexed.

This has not been done in this case presumably because the Plaintiff erroneously believed that the court had declared the Will to be void.

Counsel for the Defendant has drawn attention to the fact that the Plaintiff instituted this action in the capacity of Administratrix and beneficiary of the estate of **SAMUEL T. JONES** (Deceased). I am of the view that she lacks capacity to sue as Administratrix of the said estate as she is not entitled in law to take out the grant of Letters of Administration in the circumstances of this case, the Executor of the Will being alive and he not having renounced his appointment as executor.

In the circumstances of this case I do not believe I can allow the action to continue. It would be an abuse of the process of the court to relitigate on factual issues raised and dealt with in the previous matter before the High Court. The application is granted. The Originating Summons dated 10<sup>th</sup> October 2013 is hereby struck out in that it is an abuse of the process of the Court. The costs of the application to be borne by the Plaintiff/Respondent to be taxed if not agreed upon.

*A. Showers*  
SIGNED: - A. SHOWERS 26/3/2014  
JUSTICE OF COURT OF APPEAL