CIV APP 40/2009

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ALHAJI MOHAMED BARRIE - APPELLANT

AND

FRANCIS MUSA KUTUBU - RESPONDENT

COUNSEL:
N D TEJAN-COLE ESQ for the Appellant
J B JENKINS-JOHNSTON ESQ for the Respondent

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE A S FOFANAH, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 31ST DAY OF MARCH,2015.

THE APPEAL

1. This is an appeal brought by the Appellant, Alhaji Barrie, by way of Notice of Appeal dated 9 November,2009, against a Judgment of SHOWERS,JA dated 13 October,2009.
2. The Grounds of Appeal are as follows:
   (1) The Learned Trial Judge erred in law to apply:
      (a) English statutes not applicable in Sierra Leone;
      (b) English statutes that are not of general application in England on 1st January,1880; and
      (c) English statutes that have not been adopted under the Imperial Statutes (Law of Property) Adoption Act, Chapter 18 of the Laws of Sierra Leone,1960.
   (2) The Learned Trial Judge was wrong in law to hold that exhibit D the assent to the Plaintiff's beneficiaries was not in the form stated in Volume 17 Halsbury's Laws of England 4th Edition paragraph 1350 under the rubric "*Form of Assent*". Assent can be expressly or by implication. In this regard the trial Judge has

applied the English Administration of Estates Act,1925 not applicable in Sierra Leone.

(3) Until an Assent is made, a beneficiary has an inchoate right transmissible to the Personal Representatives. However, executors by assenting expressly or by implication, cease to hold property as executors and in the present case since the executors were appointed also trustees they hold property as trustees but collectively as trustees (sic) or individually, they were precluded from making title as executors or executor. Consequently, they or one with someone else cannot convey legal estate to Francis Musa Kutubu, the Defendant.

(4) Executor(s) cannot sell, transfer or dispose of realty without taking probate. However, when appointed as executors and trustees they have power to sell, transfer and dispose of realty in their capacity as trustees.

(5) The Learned Trial Judge was obliged to give reason(s) why she rejected the testimonies of Momoh Kanu, Hassan Kanu, Monday Kanu, Alimamy Farama and Ezekiel Sitta Bangura.

(6) The verdict is against the weight of the evidence.

3. The Notice of Appeal can be found at pages 359 &360 of the Record. Henceforth, all references to page numbers shall be taken as references to pages in the Record.

4. We note that this appeal was brought by just one Appellant, who was, it appears, the 1st Plaintiff in the action tried in the Court below. The other Plaintiffs, so-called, have not appealed against the said Judgment. This brings us firstly, to the question of how the other three persons became Plaintiffs.

THE WRIT OF SUMMONS

5. The Appellant began the proceedings in the Court below by way of writ of summons issued on 14 October,2005. His claim was for a Declaration of title to land described and delineated in survey plan, LS1875/05 dated 28 September,2005 drawn and attached to Deed of Conveyance dated 6 October,2005 and duly registered as No. 1853/2005 at page 61 in volume 591 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. After he had bought this piece of land from the owners thereof, he appointed one of them to the position of caretaker of the land as he was going out of the country. On his return, he found out that the Defendant had, in the interim, brought ejectment

proceedings against the caretaker. The Magistrate's Court in which the ejectment proceedings had been brought, proceeded to Order the eviction of the caretaker and the other occupants, from the land. He therefore prayed in his writ, for the cancellation of the any deed conferring title to the property, on the Defendant.

APPEARANCE ENTERED

6. Appearance was entered for the Defendant by the then firm of Roberts & Partners on 20 October,2005 and Notice of the same was given to Plaintiff's Solicitors the same day.

DEFENCE FILED

7. That same day, 20 October,2005 the Defendant filed his defence. He averred that he was the true owner of the property in dispute, having bought it from the so-called 2nd, 3rd and 4th Plaintiffs. His deed of conveyance from them was dated 24 May,2005 and was duly registered as No. 953/05 at page 63 in volume 588 of the Record Books of Conveyances. It enclosed survey plan LS350/05 dated 7 April,2005. The 2nd -4th Plaintiffs, (at the time not yet parties to the action), had consented to the sale of the property to him. After he had bought the party, the 2nd and 4th Plaintiffs had left the premises; 3rd Plaintiff was left there to ensure that all the tenants vacated the same. He later had to bring the eviction proceedings in the Magistrate's Court against 3rd Plaintiff and the other tenants, because they had refused to give him vacant possession.

APPELLANT'S APPLICATION FOR AN INJUNCTION

8. The Appellant applied to the Court below, for an Interim Injunction, restraining the Respondent from carrying out any construction work on the land. On 19 October,2005, the day before appearance was entered for the Respondent, MASSALLAY,J Granted the Injunction ex parte. On 21 October,2005 the Appellant entered the action for trial and gave notice of the same to Respondent's then Solicitors, the same day.
9. By Notice of Motion dated 24 October,2005 the Respondent applied to the Court below, for, inter alia, an Order discharging the Interim Injunction granted. On 27 October,2005 MASSALLAY, J vacated his Order of 19 October,2005 and adjourned to 31 October,2005 for an inter partes hearing. On 1 November,2005, MASSALLAY, J Granted the

Appellant an Interlocutory Injunction - pages 89, 220 & 221. On 7th November,2005, the Appellant began testifying before MASSALLAY,J - pages 221 - 222.

MASSALLAY, J RECUSES HIMSELF

10. At page 223, it appears that MASSALLAY,J recused himself from the trial. The entry for 29th November,2005, so far as it is legible, reads as follows: "*Case called: The Defendant and Counsel Mr M S Turay present. The plaintiff and his counsel Mr Amadu Koroma absent. This matter stands adjourned to 2/12/05 to.....the actions of the Chief Justice with respect of (sic) the request for a .....or of this action to another judge as a serious allegation has been made.....with me (sic) by the plaintiff.*" The case file was then assigned to SHOWERS,J.

PROCEEDINGS BEFORE SHOWERS,J

11. On 16 December,2005, SHOWERS,J gave certain limited Directions for the future conduct of the action, and adjourned the hearing to 18 January,2006 - page 224.
12. But before the adjourned hearing date, by Notice of Motion dated 20 December,2005 the Appellant applied to the Court below for the Respondent to be Committed for Contempt of that Court's Order dated 19 October,2005 even though that Order stood vacated as of 27 October,2005 and had been replaced by an Interlocutory Order as of 1 November,2005. The Application was later abandoned by the Appellant. By Notice of Motion dated 3 January,2006, he applied once more to the Court below for a Writ of Attachment and a Warrant of Arrest to issue against the Respondent for breach of the respective Orders of 19 October and 1 November,2005. That Motion, we are told at page 168 - (paragraph 19 of Appellant's affidavit of 10th May,2006) - by Mr Koroma, was later adjourned sine die after an oral undertaking had been given by the late Mr Turay that the Respondent would refrain from doing any work on the land until the action was disposed off. This is not clear on a perusal of the minutes of SHOWERS,J for 6 January,2006 at page 225. There, Mr Koroma is recorded as saying: "*I do not wish to proceed with the earlier one filed on 20th December,2005....*"The Learned Trial Judge awarded Costs in the sum of Le10,000 against the Appellant, but the earlier Motion was not actually determined, nor was it struck out that day. The Learned Trial Judge also recorded on the same page that a locus

in quo was fixed for Saturday 7th January,2006 at 11am. Hearing was then adjourned to 12th January,2006.

LOCUS IN QUO - PROPER PROCEDURE

13. The minutes for 12 January,2006 at page 226 read as follows: "*Mr Koroma - You did ask for the Solicitors to visit the site with the Registrar. Registrar -SOB - Report read. Mr Koroma - Court - The application for contempt proceedings stands adjourned sine die.*" The Report is at page 358. It was held on 7th January,2006. A reading of the Report shows that the Learned Trial Judge was not at the locus. In our view, and based on the authorities, no such view can be held in the absence of the trial Judge. A locus in quo forms part of the trial presided over by the judge.
14. We think we should correct what is clearly a wrong procedure, but which it seems, has been repeatedly followed, in certain respects, by the Courts below. A locus in quo is a visit to the scene of an incident; it is the Court moving to the scene, the subject matter of the complaint. As such, the Registrar is not really a participant in the proceedings. A locus in quo is held for parties and their witnesses to make indications and sometimes, to take measurements, when these are necessary, in the presence of the Judge and Counsel where Counsel has been briefed. The correct procedure is for witnesses who have testified, or who are to testify, to point out material evidence relevant to the issues in dispute. Each of these witnesses could be asked questions by Counsel on either side in the presence of the Learned Trial Judge. The Learned Trial Judge could himself ask questions if necessary. Notes of what transpired at the locus could be taken down by Counsel or, by their clerks or assistants, and then verified by the Learned Trial Judge. These notes are merely taken for the purpose of refreshing the memories of witnesses when they return or go to the witness box for the first time. At the adjourned hearing in Court, the witnesses who have taken part in the locus in quo, are re-called, if they have already testified, to the witness box, for cross-examination and re-examination on the actions taken by them or things said by them at the locus in quo. If they have not already testified, they will be questioned on the locus in quo when it is time for them to testify in the witness box. The Registrar of the Court is not a witness for either side, nor, can he, at a stage where neither party has closed his case, become a witness of the Court. In civil case, unlike criminal cases, there is no provision for a Registrar of the Court to be interposed as a witness

at any stage. In criminal cases committed for trial to the High Court, a Registrar of Court, as custodian of the depositions taken at the Preliminary Inquiry, could possibly give evidence where the prosecution intends to tender the depositions of a witness who is unavoidably absent, pursuant to the provisions of Section 65 of the Criminal Procedure Act,1965. Even there, the prosecution would need to file an additional witness notice pursuant to Section 188 of the same Act, as the Registrar's name would not have appeared on the back of the Indictment. Locus in Quo or "viewing" is quite common in civil cases, and though rare in criminal cases, the rules and practice are much the same.

15. At paragraph 1-15 PHIPSON ON EVIDENCE, 13th Edition, the practice, as it pertains both trials with jury and without a jury, is set out: *"....For the same reason, the jury must not communicate with witnesses during a view, irrespective of the point in the trial at which it occurs; but the judge may, either of his own notion or, at the request of counsel, ask witnesses to assist the court on relevant matters, such as the position in which they themselves or other persons or things had been at material times, provided that those witnesses are recalled to be cross-examined if so required, A view at which witnesses give demonstrations or answer questions is part of the trial and of the evidence in the case....."*
16. Two reported Sierra Leonean cases deal with this point. The first is the criminal case of KIRKE v R [1950-56] ALR SL 69, HC, an appeal from the Magistrate's Court. There, BEOKU-BETTS, Ag CJ said at page 70: "*If the Magistrate inspects the locus in quo, and proposes to rely on this inspection, evidence should be called as to the inspection. The Magistrate cannot rely upon her own knowledge of what took place. The Magistrate therefore erred in relying upon the result of the locus in quo inspection without calling evidence as to what took place at the inspection.*" Of course, in this appeal, the Learned Trial Judge did not inspect the locus on her own; she did not even attend. But the underlying principle is that a viewing forms part of the trial, and evidence as to what transpired there has to be given on oath. It was also discussed in the case of SAMUELS v R [1937-49] ALR SL 48 WACA at pages 50-51. There the main issue was the absence of the accused at the viewing. His appeal against conviction was therefore allowed.
17. A case which seems to have decided that examination on oath in Court was not absolutely essential after a locus in quo, provided the witness's testimony at the viewing had been recorded at the scene by the trial Judge, seems to be NWIZUK v ENEYOK [1953] 14 WACA, 354. There,

the Learned Trial Judge went to view the land in dispute in the presence of representatives of the parties. One of the defendants admitted that some of the evidence given for them was false and the plaintiffs also admitted that evidence given for their side regarding some part of the land was false. In the judgment dismissing the plaintiffs' claim to the land the judge gave an account of his inspection and mentioned the said admissions. The plaintiffs appealed arguing that it was a mistake for the judge to have taken into account statements made at the inspection. The argument was rejected by the West African Court of Appeal as the trial court had not ceased to be a court because it was on an inspection away from the court house. But that case was decided on the basis of the particular Nigerian Code in existence at the time, and not the practice at Common Law, that save for specified exceptions, for evidence to be admissible at a civil trial, it has to be given on oath, or, as is the present practice, by the witness adopting his witness statement made out of Court, as the whole, or part of his evidence in chief in court. However, that was a case in which the trial judge was present at the view, but went on to, in effect, give his own testimony, rather than record that of the parties or their witnesses, as to what transpired at the viewing.

18. The present practice in the sister jurisdiction of Nigeria seems to be that stated in his CIVIL PROCEDURE IN NIGERIA, 2ND Edition, by FIDELIS NWADIALO where he has stated at page 697 that: " *The trial judge's observations at the inspection of the scene are not evidence and it is erroneous for him to treat them as established facts and proceed to make findings on them unless evidence thereon has been received at the scene or in court through a witness and parties have been given the opportunity to hear the additional evidence and cross-examine on it.*" In Nigeria, specific rules relating to a view are to be found in Section 77 (2) of the Evidence Act, Chapter 112 of the Laws of the Federation of Nigeria,1990. We think the proper procedure to be followed should be brought to the attention of all trial Courts. In the present case, we are of the view that the admission of the Registrar's Report as exhibit was wrong in law.

CHANGE OF SOLICITORS; TRIAL RE-COMMENCES BEFORE SHOWERS, J

19. To return to the proceedings, by Notice dated and filed on 5 January,2006, the Respondent appointed the late Mustapha Turay as his Solicitor in place of the then firm of Roberts and Partners – pages 126 & 127. On 12 January,2006 the Appellant and his Solicitor filed an

undertaking as to Damages in respect of the Injunction granted on 1 November,2005 - page 128. On 20 January,2006 - page 226, SHOWERS, J appointed 24 January,2006 as the date for trial. But the trial actually re-commenced on 26th January,2006 with the Appellant testifying as PW1.

20. On 29 March,2006, the Respondent once more changed Solicitors and appointed Jenkins-Johnston & Co in place of the late Mr Turay - pages 130 & 131. Here again, we wish to lay down what the correct procedure should be. The Notices filed by Jenkins-Johnston & Co refer to the Firm of Messrs Roberts & Partners as the Respondent's previous Solicitors. This was incorrect as Mr Turay had become the Solicitor on Record as of 5 January,2006. We note that the Notices filed were addressed to Messrs Roberts & Partners even though they had ceased to be Solicitors on Record, and not to Mr Turay. This was wrong. This error may have arisen because the new Solicitors did not search the Court file. Solicitors must ensure that the Court file is searched properly before filing such Notices.

RESPONDENT'S MOTION OF 19 APRIL, 2006 - WRONGFUL ADDITION OF PARTIES

21. By Notice of Motion dated 19 April,2006 - pages 132 - 165, the Respondent applied to the Court below for several Orders. He applied for leave to be granted to amend the Defence filed, and to add a Counterclaim; also, "*that the names Momoh Kanu, Hassan Kanu and Mondeh Kanu whose presence before the Court is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in this cause, be added as Plaintiffs herein, pursuant to Order X11 Rule 11 of the High Court Rules*"; and also that the Interim Injunction granted on 19 October,2005 be set aside on the grounds of irregularity, which grounds appear on the face of the Motion paper at page 132. The Record of course shows that that Order had been discharged by MASSALLAY,J on 27 October,2007, and that this part of the Motion was therefore unnecessary.

22. Mr Amadu Koroma, then Solicitor for the Appellant, deposed and swore to an affidavit in opposition to that Application - pages 166 -209. The Appellant's Application came up before SHOWERS,J. The drawn up Order is at page 210. The minutes of the hearing are at page 234. Mr Koroma, Counsel for the Appellant did not object to the 1st and 2nd Orders prayed for, and they were granted. These were the application to amend the

defence, and the application for joinder. We think we should examine this latter order prayed for in some detail.

ORDER XII RULE 11 - HIGH COURT RULES, 1960

23. That part of the Application was made pursuant to Order XII Rule 11 of the then High Court Rules,1960. It reads in part: "..... *The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order..... that the names of any parties, whether plaintiffs or defendants, who ought to have been joined , or, whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under a disability, without his own consent in writing....."*
24. At page 234, the Learned Trial Judge noted that Mr Koroma was not opposed to the granting of orders 1 and 2, prayed for. The Orders were thus granted with Costs to the Appellant in the sum of Le500,000. Hearing was adjourned to 11th then to 23rd May,2006 and then finally to 1st June,2006 for the hearing into that part of the Application dealing with the granting of an Injunction. On the last mentioned date, Mr Jenkins-Johnston applied for the motion to be withdrawn. The only portion left in that Application for adjudication, was that relating to the discharge of the Injunction. Mr Koroma had no objection to this, and Mr Jenkins-Johnston's application was granted by the Court. The trial proceeded with PW2, Hassan Kanu continuing with his evidence in chief.
25. As we have stated above, we think we should deal with the Order for Joinder made by the Learned Trial Judge. In our view, it is mandatory that the consent of a person to be joined as Plaintiff, must be obtained. The Rule itself is clear, and the cases have decided that this is so, beginning with RE:THE DUKE OF BUCCLEUCH [1893] P 211, and WOOTON v JOEL [1920] W N 28 and others. It is clear that no such consent was obtained. The absurd situation then arose that persons had been joined as parties to an action to which they had not consented; they had not given instructions for pleadings to be filed or amended on their behalf; and no pleadings had been filed on their behalf. In practice, it is an existing Plaintiff who normally would ask for another party to be joined as Plaintiff. If a Defendant to an action thinks or believes that another party is necessary to an action brought against him, he can apply

to the Court for that party to be joined in one of three ways: he can either apply to the court for that party to be joined as an additional defendant; or, he can apply for that party to be made a Defendant to his Counterclaim; or, he can apply for that party to be joined as a third party, if an indemnity or contribution to any made against him, is to be claimed. There is no authority for a party or parties to be joined as Plaintiffs without his or their consent. When we examine the Judgment itself, at pages 296 – 323, it begins with a reference to the 1st Plaintiff, but towards the end, at page 322, and in the Orders made on pages 323 and 324 respectively, only "*the Plaintiff*" is referred to. So, we have a Judgment in which parties who have not willingly joined an action being mulcted in Costs, impliedly, because they were not excluded from the Costs Order, at the end of the day. The Order for Joinder – page 210- was clearly wrong in Law, and ought to be set aside, and is therefore SET ASIDE.

26. Further, even though the Order for Joinder was granted, the pleading filed by the Defendant at pages 210 – 213, still bore the name of the Appellant only. But the Learned Trial Judge's Judgment beginning at page 296, and the drawn-up Order of Court at pages 325 – 326, bear the names of the Appellant and the other Plaintiffs who were joined as parties. Where persons have been made parties to an action after pleadings have closed, and after the trial has commenced, consequential Orders have to be made, so that the added parties' interests may be fully represented and argued in Court.

THE CASE PRESENTED BY APPELLANT AND RESPONDENT, RESPECTIVELY IN THE COURT BELOW

27. The Appellant's case was that the other wrongly joined Plaintiffs had title to sell to him. The Respondent's case was that they had no title to pass on to the Appellant, and that title to do so resided in the Executors of the deceased testate's Will. There was of course, the issue of whether the other Plaintiffs in the Court below, had received monies from the Appellant as consideration for the sale to him of the property. By her Judgment, the Learned Trial Judge must have accepted that they did. We have already decided that they were wrongly joined and ought not have been added as Plaintiffs to the action.

APPELLANT'S CASE IN THE HIGH COURT

28. In order to examine the strength of the Appellant's case in the Court below, we have, first, to look at the Will, exhibit G at pages 346 and 347. In clause 2 thereof, Mambu Kallon, PW6, and Alimamy Faramah, PW3 were appointed Executors and Trustees of the Will. In clause 3 thereof the property situate at and known as 90 Freetown Road, Lumley, was devised, apparently, to the Executors on Trust for the Testator's children named therein. We say apparently, because in our copy of page 346, the first page of the Will, the words between "*adjoining*" and "*...for my children...*" are missing. But because of the words following the names of the children, it is apparent that a trust was being created. These words are: "*for my children namely: Maliki Kanu, Kamanda Kanu, Sheku Kanu, Hassana Kanu, Momoh Kanu and Mondeh Kanu until each one becomes of age according to the laws of Sierra Leone".* According to PW2, Hassan Kanu, who was also 3rd Plaintiff in the Court below, they had all attained their majority at the time the purported sharing out of the property was done by the two Executors. Further, during the course of his evidence at page 260, PW6, Mambu Kallon, one of two executors named in the Will, did say: "*Yes, in 2005 all the children had attained the age of 21 years and above.*" This piece of evidence was not challenged. The 4th Plaintiff who testified as PW4 said at page 248 that she was 27 years old at the time the property was distributed. The document, purporting to assent to the vesting of the property in them, was apparently tendered as exhibit D, though it did not satisfy the requirements of the law as it had not been duly registered in accordance with the provisions of Section 4 of the Registration of Instruments Act, Chapter 256 of the Laws of Sierra Leone,1960 as amended - see pages 229-233 and 247. PW3 did say at pages 242 & 246 that he had it with him in Court, but it could not be tendered. It appears at page 247, that PW1 was re-called to tender it as exhibit D.

WHETHER REALTY REQUIRES VESTING BY DEED IN BENEFICIARIES

29. The question which then arises is who had title to the property, and who had a right to convey the same. Mr Jenkins-Johnston, Counsel for the Respondent, has in this Court and in the Court below, argued that the Executors had the right to sell the property devised on trust to 2nd - 4th Plaintiffs, and he relied on the Law as stated in HALSBURY'S LAWS OF ENGLAND 3RD Edition Vol.16 under the title "*Executors and Administrators.*" Mr Manly-Spain on the other hand, argued in the Court below, that the power of sale lay with the 2nd - 4th Plaintiffs in the Court

below, they being beneficiaries named in their late father's Will. He however failed to provide the Court below with the relevant legal authority for his argument. His reference to CHITTY ON CONTRACT, at page 285 was inapplicable, as the transaction related to real property and not to personal property. His reliance on a purported vesting assent which was not registered, and not even tendered, did not advance the Appellant's cause in that Court. In this Court, Mr Tejan-Cole has argued at pages 4-6 of his synopsis that executors can impliedly assent to the vesting of property in beneficiaries, and that there is no legal requirement under our adopted law that such a vesting has to be in writing and be done by deed. He argued that the Law requiring vesting to be done by deed did not apply in Sierra Leone, as it was contained in the English Law of Property Act,1925. The applicable Law here, is to be found in the English Land Transfer Act,1897 which was incorporated into our Laws by the Conveyancing Act,1911 which is part of our Laws also by virtue of the Imperial Statutes (Laws Adaptation) Act, Chapter 18 of the Laws of Sierra Leone,1960. What is clear from the arguments on both sides, is that the citations from Halsbury's Laws of England, 3rd Edition Vol.16 and 4th Edition, volume 17 by Mr Jenkins-Johnston, and the reliance placed on them by the Learned Trial Judge at pages 315 - 322 was erroneous as the statements of the Law contained in both volumes are based on the English Administration of Estates Act,1925 and the Law of Property Act,1925, respectively. Judges and Lawyers must be particularly careful when referring to the Legal texts based on the Law as it is, or was, in England. We must be mindful of the reception date of English statutes of general application, i.e. 1 January,1880, save where they have been adopted as part of our Laws by Cap. 18.

30. Mr Tejan-Cole has, at page 5 of his synopsis referred to exhibit D. Exhibit D in the Record is copy of the Will - pages 334 - 338. What we believe Mr Tejan-Cole was referring to was what PW2, Hassan Kanu referred to while giving evidence as "*.....a document was prepared when they shared the property....*". This is at page 229. At pages 232 - 233, the Learned Trial Judge did rule on 31st March,2006, and also on 19 June,2006 - pages 239-240, that a copy of it was admissible. PW2's testimony was interrupted by the Defendant's Application for joinder. When he resumed giving evidence on 1st June,2006, and also when being re-examined by Mr Koroma at page 239, he did make reference to it, but it was not then tendered in evidence. But at the top of page 247 during the proceedings on 27 November,2006 , it appears that the document

described as the one PW3 and Mambu Kallon used to share out the property between the beneficiaries, was indeed tendered as exhibit D. But there is no evidence of it in the Record. What is reproduced at pages 334 - 340 as exhibit D, is a copy of the Will. Whatever might be the case as regards that document, the issue of whether the 2nd - 4th Plaintiffs had a right to sell to the Appellant, has to be decided on the basis of the current state of the Law.

GOODING v ALLEN

31. This issue was dealt with in the case of GOODING v ALLEN [1937-39] ALR SL, 328 H.C. where BEOKU-BETTS, Ag J stated the Law as it was then, and still is at pages 335-336: "*But the assent of the executor before 1897 was confined to personalty and to leaseholds which are chattels real and not realties. It applied to bequests and not to devises.....By the Land Transfer Act, 1897 when real estate vested in the personal representative instead of the devisees as hitherto, it was expressly provided that the executor must assent to the devise to transfer title to the devisee. The Land Transfer Act, 1897 is not in force in this colony, as it was subsequent to 1880..... and therefore the requirement of the executor's assent is not operative in this colony. The land devised by a testator vests immediately in a devisee, subject to the provisions of s. 3 of the Execution against Real Property Ordinance Cap. 61 (now Chapter 22 of the Laws of Sierra Leone,1960). ....This section is virtually a reproduction of the Administration of Estates Act, 1833. The interpretation of this Act is that the land is made assets for the payment of debts but it does not vest in the personal representative, and real properties did not vest in the personal representatives until 1897.....There is therefore no law in this colony requiring an executor to assent to a devise and the assent if given is out of abundant caution and only goes to show that the executor has no claim on the property....*"
32. This case was cited by Counsel for the Appellants in ROSE & ORS v SAWYERR & ORS [1962] Vol.2 SLLR, 121, C.A., and its accuracy as to the state of the Law in Sierra Leone was not disputed by AMES, Ag. P at pages 124-125 of his judgment. At the top of page 125, he said: "*Consequently, no assent from an executor is needed....*"
33. Mr Tejan-Cole has argued at paragraph 12 page 5 of his synopsis that the English Conveyancing Act,1911 which applies in our jurisdiction by virtue of Cap18, "*.....incorporates the English Land Transfer Act,1897....*" He continues: "*...and by this latter Act an Assent of a devise to real estate*

vests in the Personal Representative as an assent to a bequest of leasehold does." He concludes that: "*..... The assent might be either express in which case it was usually in writing or impliedly.....*" Here, we think, Mr Tejan-Cole has misquoted the provisions of the 1911 Act. We think he is here referring to Section 12 of the 1911 Act which is the only provision relevant to the issues in dispute in this case. It states: " *12-(1) Where probate is granted to one or some of several persons named as executors, power being reserved to the others or other to prove, the sale, transfer or disposition of real estate may, notwithstanding anything contained in subsection (2) of section two of the Land Transfer Act,1897, be made by the proving executor or executors without the authority of the court and shall be as effectual as if all the persons named as executors had concurred therein. (2) This section applies to probates granted before as well after the commencement of this act, but only as respects dispositions made after the commencement of this act.*" This provision deals with the situation where a Grant of probate is made to one of two or more executors. In such a situation, the proving executor could sell property belonging to the estate, and his act would be taken as that of the other executor or executors to whom power was reserved. It removed the requirement contained in Section 2(2) of the 1897 Act that it was not lawful for one of two or more executors to transfer real estate without the authority of the court.

34. On the facts of the instant case, no probate had been obtained, and so the statutory provision in Section 12 of the 1911 Act does not affect the law as stated in GOODING v ALLEN. Further, the evidence which was relied on by the Respondent, and accepted by the Learned Trial Judge, was that only one of the two executors, Mambu Kallon, signed Respondent's deed of conveyance. This conclusion is supported by the evidence of PW8, D/Inspector Ezekiel Sitta Bangura . In his report, at pages 365 -366, he states that the thumbprint on the Respondent's deed, exhibit H, was not that of PW3, Chief Alimamy Farama. The other executor, PW3, did say in evidence, that he did not sign it, nor, was he aware of its existence. In addition, PW8's second Report, (exhibit K, pages 367 -368), on the sale agreement, exhibit C at page 329, is that the thumb print on it purporting to be that of PW3, was not his.

EVIDENCE THAT ONLY ONE EXECUTOR, PW6, SIGNED RESPONDENT'S DEED

35. There was sufficient and cogent evidence before the Learned Trial Judge that even if she was correct in holding that the executors did have power to sell the property devised, the deed purportedly executed by both executors, PW3 and PW6 could not be upheld because there was irrefragable proof that the signature of one of them had been forged. Even the Solicitor, the late M S Turay who prepared the deed, did say in evidence as DW2 at pages 275 - 277 that he was not present on any occasion when PW3 purportedly signed exhibits C and H, respectively. Also, there was no clear evidence before the Learned Trial Judge that the so-called balance of the purchase price - be it Le22million plus or otherwise - the Respondent claimed he had paid over to this Solicitor Mr Turay, who testified as DW2, was ever paid over to the 2nd - 4th Plaintiffs in the Court below. All DW2 said at page 276, was: "....*Since then all further payments were made by me on behalf of the defendant and handed over to Momoh Kanu....*" These payments, unlike the earlier payments for Le1m and Le2.6m respectively, were not receipted. And Momoh Kanu, the 2nd Plaintiff in the Court below, did not testify in Court.

FINDING: 2ND - 4TH PLAINTIFFS HAD GOOD TITLE TO PASS ON TO APPELLANT

36. It is our view that prior to 1897, the Law relating to the vesting of the interest of a beneficiary under a will was as stated in GOODING v ALLEN: it vested immediately in the devisee, and not in the personal representatives of the testator. As such, the devisee had good title to convey to a purchaser. It follows that the 2nd - 4th Plaintiffs in the Court below, two of whom testified as PW2 and PW4 respectively, did have good title to pass on to the Appellant.

BURDEN OF PROOFF IN LAND CASES

37. We agree that the Learned Trial Judge in her judgment stated correctly at page 318-31, the law relating to the burden of proof in cases where the Plaintiff claims a declaration of title to property. It is the duty of the Plaintiff to prove that he has a better title than the Defendant. He must not rely on the weakness of the Defendant's title. She was also quite right when she said at page 319: "....*it is therefore incumbent on the Plaintiff to prove that his vendors had title to pass to him.....*" Where we believe she went wrong, was in quoting and relying on passages in HALSBURY'S LAWS OF ENGLAND 3rd Edition which stated the Law post

1925 and not pre-1897 as should be the case. The citations she made are quite correct as far as the English Administration of Estates Act, 1925 and the Law of Property Act,1925 are concerned. The conclusion she arrived at at page 320 that: " *It is therefore clear that exh D relied on by the Plaintiff's vendors as vesting the legal estate in them does not in anyway conform to a vesting assent required by law. The Plaintiff's vendors therefore had no title to pass on to him when they purported to execute his deed of conveyance dated 6th October,2005" is* wrong, and insupportable in Law. As we have pointed out, because the English 1897 Act does not apply in Sierra Leone, a Vesting Assent is not really necessary to transfer title to a beneficiary named in a Will. It will be necessary in the case of an intestacy. Exhibit D, whatever it may have been, was not therefore necessary to confer title on the 2nd - 4th Plaintiffs in the Court below. For the same reason, the authorities adverted to by the Learned Trial Judge at page 321 do not apply in Sierra Leone.

PURCHASER FOR VALUE WITHOUT NOTICE

38. Coming to the Respondent's title, the Learned Trial Judge said at page 322: "*...It is clear that the Defendant being a purchaser for value without notice has obtained good title even if there was some element of fraud in the conveyance. There was also evidence that the beneficiaries of the property knew about the sale and consented to it and received the benefit - see exhibit A & B and the evidence of Mr Mustapha Turay, their former solicitor."* Of course, the Judge at a trial is in a position to decide which of several witnesses giving evidence contradictory of each other, she is prepared to believe. Here, we have the evidence of DW2 that a certain amount of money, Le1m was paid in his presence, to two of the Plaintiffs on the first occasion of their meeting at his office - page 275. They signed exhibit B. The next day, he said - (page 276) -they returned to his office, and he prepared exhibit C which was signed by only two of the three beneficiaries: i.e. 2nd & 3rd Plaintiffs (but not 4th Plaintiff). But when exhibit C at page 329 is examined, the name Mondeh Kanu, that of 4th Plaintiff appears, and a signature appears above her name. Who signed on her behalf? Further, the supposed signature of Momoh Kanu on each of exhibits A, B & C respectively, clearly differ. PW2, the other beneficiary and supposed signatory to each of these documents, said in evidence that he did not sign them. Momoh Kanu was not called to give evidence even though the Respondent had had him joined as a Plaintiff.

Having accepted as she did that there was an element of fraud in Respondent's conveyance, it was rather paradoxical that she should go on to hold as she did at the same page 322 that the Respondent was *"a purchaser for value without notice"*. The Respondent knew very well that the 2nd - 4th Plaintiffs were the beneficiaries named in their late father's Will. Contrary to what the Learned Trial Judge said at the same page 322 that Mr Turay was "*their Solicitor*" meaning thereby, the Solicitor of the 2nd - 4th Plaintiffs, the evidence was that they were taken to Mr Turay the very first time by the Respondent even though they were persons who had been known to him, i.e. Mr Turay, before. The Respondent did have notice of who the true owners were. His Solicitor, like many others, made an error as to who had the right to convey the property. The error lies not only in the fact which eventually came to light that only one executor had executed the Respondent's Deed, but also that a fraud had been perpetrated in that the other executor's finger print had been forged. We hold that a party to an action cannot benefit from a fraud which inures to his benefit, notwithstanding what was said in the case cited below. The Learned Trial Judge's conclusion in the second paragraph on page 322 that: "*The Defendant is therefore not bound to inquire as to the integrity of the Executor's or the application of money...*" is therefore unsupported in Law. We think that Mr Tejan-Cole's complaint in paragraph 15 at page 7 of his synopsis is justified in that the Learned Trial Judge seemed not to resolve the glaring contradiction in the evidence given by PW2, PW3, PW4 and PW8 on the one part and the Respondent and his witnesses on the other. We think that a comment on the status of the expert's report was apposite and quite necessary in the circumstances of the case.

39. We think also that the Learned Trial Judge should have commented on the discrepancy between the evidence of PW6, Mambu Kallon, with that of the Respondent as DW1, and that of Mr Turay, DW2. For instance, at page 259, PW6, Mambu Kallon is recorded as saying: "....*I witnessed a payment of Le10million through another solicitor Mr Mustapha Turay to Mr Momoh Kanu and Hassan Kanu in the presence of the solicitor. I signed on the receipt in the presence of the solicitor. I see exhibit C. I see my signature as a witness. I witnessed all the payments made in the presence of Mr Mustapha Turay.....*" But when we examine exhibit C, it records a total payment of Le5.4million only. Contrast this with what the Respondent himself said at page 270: "*On 15th February we went there. I see exhibit C -document which I agreed. On that day I paid Le1,800,000*

totalling Le5,400,000 as reflected in exh C. On the next day, 16th February I paid the sum of Le22,600,000 to lawyer Mustapha Turay..." And also contrast what PW6 said with what Mr Turay himself said as DW2. He did not at any point in time mention the payment of Le10million. A pertinent question the Learned Trial Judge should have asked herself in the absence of testimony from Momoh Kanu, was, "*to whom was the sum of Le22,600, 000 eventually paid*"? The trail seems to have stopped at Mr Turay's door.

40. It is true that the innocent purchaser for value is protected by the Law and the judgment of the Court in TURAY v KAMARA [1967-68] ALR SL 89, confirms this. In that case, BETTS,J said at page 176 LL26 - 34: "*These, to my mind, are two pieces of evidence material to this case which would have gone a long way, if not completely, to prove that the first defendant's conduct was deliberate misrepresentation intended to defraud the plaintiff and obtain his property. Neither has produced the type of evidence to satisfy the requirements of the law. In fact, neither has offered any proof at all. The law says that if the fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings.*" The Respondent alleged fraud on the part of the 2nd - 4th Plaintiffs. But, PW8's evidence was to the effect that it was he who had perpetrated the fraud because the deed and the agreement on which he, the Respondent relied were proven to be false, in that PW3 had not thumb-printed either or both of them. BETTS, J went on to say at L36 on page 176 to L3 on page 177: "*The case of PILCHER v Rawlins is more appropriate in this action than Hunt v Luck. In the former the principle is that whenever a purchaser has obtained, by whatever means, a good legal title for which he paid his money and is in possession, he is entitled to the benefit of it. Even if the execution of the conveyance had been effected by another's fraud, the interest of an innocent purchaser without notice should not be prejudiced...*" In the instant case, the Respondent had clear notice of who the real owners of the property were. Clearly, the signature of one of the supposed executors was forged in the Respondent's deed and in the 'sale agreement', exhibit C. And, because of the state of the Law, he had not obtained what could be described as a *'good legal title'*. Also, the Respondent was alleging fraud, not on the part of the Appellant, but on the part of persons who had been wrongly joined as parties, one of whom was not called to testify at all as to the monies allegedly received

by him, and as to the alleged fraud on his, part and on the part of his sister and brother.

41. Section 3(1) of the Conveyancing and Law of Property Act,1882 which is part of the adopted Law of Sierra Leone by virtue of Schedule to Chapter 18 of the Laws of Sierra Leone,1960 provides that: " *3(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless - (i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.*" The Respondent knew the beneficiaries very well, and so he cannot be said to have been ignorant of their claims to, or interest in the property he intended to buy.

PRIORITY OF REGISTRATION

42. The argument that the Respondent's deed was first in time and that it should therefore take priority over that of the Appellant is not also supported in Law on the facts of the instant case. The '*first in time*' rule, with the greatest respect to Mr Jenkins-Johnston only applies where the '*first in time*' document is itself regular or, not without any irregularity. The fact is that, in Law, the executors had nothing to convey; still less, had the one executor, PW6 anything to convey to the Respondent. Over and above that, the forgery of PW3's thumbprint is not something which ought to be overlooked by a Court of Law. We have noted also in the habbendum in the Respondent's Deed at page 353, that the vendors therein, even though mere executors, and not beneficiaries, purported to convey the property as 'beneficial owners'. They were not, as the property had not been devised to them.

COMPLAINT THAT MIS-DIRECTIONS NOT QUOTED

43. We have noted Mr Jenkins-Johnston's complaint that the mis-directions of law complained of by the Appellant have not been clearly stated. We are of the view that the grounds of appeal are explicit enough and that the Judgment of the Court below, and his synopsis, are replete with

references to the English statutes which form the basis of grounds of appeal numbered 1, 2 and 3 respectively .Further, the synopsis submitted by Mr Tejan-Cole specifies the English statutes constituting the basis of the complaint. Synopses were introduced into the practice of this Court about 11 years ago, and to a large extent, have done away with the requirement for lengthy grounds of appeal.

POWERS OF THIS COURT

44. Mr Jenkins-Johnston has also drawn our attention the powers of this Court. We have not attempted to substitute our own findings of fact for those made by the Learned Trial Judge. We have in fact adopted her findings of fact, where they have been made, and pointed out those we think she ought to have made, for instance, findings of fact on the conflict between the evidence of PW8 and that of DW1 and DW2.

RELIEFS SOUGHT BY APPELLANT IN THIS COURT

45. We now turn our attention to the reliefs sought by the Appellant in the Court below, and in this Court. In this Court, he has prayed that the Judgment of the Learned Trial Judge against the Appellant be set aside, and that a finding in his favour be entered for trespass and that a perpetual injunction be granted. The Appellant's claim in the Court below was for a declaration of title to the land in dispute; a declaration that the Respondent was a trespasser on the said land; an Injunction to restrain him from interfering with the land; cancellation of any deed purporting to confer title on the Respondent; further or other relief, and Costs. His claim was dismissed in its entirety by the Learned Trial Judge at page 323. The Learned Trial Judge entered Judgment for the Respondent and Ordered that the Appellant's Deed dated 6 October,2005 be set aside as being fraudulent and void; that it be expunged from the records of the office of the Administrator and Registrar-General; a Declaration that the Respondent was the owner of the property described in the Deed dated 6 October,2005; an Injunction restraining the Appellant from entering, remaining or trespassing on the said land; Damages to be assessed and the Costs of the action. The conclusion we have reached is that the Respondent was not entitled to any of these reliefs based on what we have said above.

46. Likewise, we have examined fully the Appellant's claim to a Declaration of title in the Court below. We have looked at his deed of conveyance at

pages 341 -345. We note that the vendors therein, the 2nd -4th Plaintiffs in the Court below declare in the first and second recitals therein at page 341 that their father died intestate. This was clearly wrong as he died living a Will. The fault may be that of the conveyancer, or, that of the vendors themselves if they had given him the wrong information. The Deed therefore has to be rectified. However, we can declare that the Appellant is the owner of the land described in the survey plan in the deed without giving our full sanction to the deed in its present defective state.

ORDERS:

47. We therefore make the following Orders:

(1) The Judgment of the High Court dated 13 October,2009 The Honourable Mrs Justice A Showers presiding, in which the Appellant's claim was dismissed, and Judgment was entered for the Respondent on his Counterclaim, is hereby set aside. Judgment is hereby entered for the Appellant in the terms following hereunder. If the Order that the Appellant's deed of conveyance be expunged from the Record Books of Conveyances has been carried out, we Order that it be restored to, and be re-instated in the said Books of Conveyances.

(2) This Honourable Court Adjudges and Orders that the Appellant is the owner and person entitled to possession of all that piece or parcel of land situate, lying and being off Lumley Road, Lumley, Freetown the area, dimensions and boundaries whereof are delineated in survey plan LS1875/05 dated 28th September,2005.

(3) This Honourable Court Orders the Cancellation of Deed of Conveyance dated 24th May,2005 duly registered as No. 935/2005 at page 63 in volume 588 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown, and expressed to be made between Mambu Kallon and Alimamy Faramah, therein described of the one part and Francis Kutubu of the other part.

(4) This Honourable Court Adjudges and Orders that the said Deed of Conveyance dated 24th May,2005 be expunged from the said Record Books of Conveyances.

(5) Consequentially, this Honourable Court Grants and Orders an Injunction restraining the Respondent by himself and/or by his

servants or agents from remaining on, or, interfering with the land described and delineated in survey plan LS1875/05 dated 28th September,2005 which land, this Honourable Court has adjudged belongs to the Appellant.

(6) This Honourable Court Orders that the Appellant shall have the Costs of this Appeal, and of the Action and Counterclaim in the Court below.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE A S FOFANAH , JUSTICE OF APPEAL