CIV APP 45/2013

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:
OSMAN JALLOH - APPELLANTS
JIHAD SWAID

AND

BASSAM IBRAHIM BASMA - 1st RESPONDENT
Administrator of the estate of

IBRAHIM ABDUL HUSSEIN BASMA (Deceased Intestate)
HUSSEIN HUBBALLAH - 2nd RESPONDENT
Attorney for
NADIA BASMA
ZEINA BASMA
NABILA BASMA
MIRVAT BASMA

COUNSEL:
Y H WILLIAMS ESQ for the Appellant
A F SERRY-KAMAL ESQ for the Respondents

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF THE SUPREME COURT
THE HONOURABLE MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

THE APPEAL

JUDGMENT DELIVERED THE 12th DAY OF MARCH,2015.

1. This is an appeal brought by way of Notice of Appeal filed on 23 July,2013 by the Appellants, Mr Osman Jalloh, a Barrister and Solicitor of the High Court of Sierra Leone, and Mr Jihad Swaid, against the Ruling of EDWARDS,J delivered on 3 July,2013. The Notice of Appeal is at pages 124 - 126 of the Record. Henceforth, all references to page numbers, should be taken as references to pages in the Record.
2. The Grounds of Appeal are as follows:

1. Having correctly stated the law in regard actions relating to disclosed principals to wit: that "*while I accept the law that a contract made by an agent acting within the scope of his authority for a disclosed principal is in law the contract of the principal and the principal and not the agent is the proper person to sue*", the Learned Judge was wrong in law and misdirected himself in holding that a claim can be maintained against the 2nd and 3rd Defendants who had in so far as the matter before the Court is concerned, acted as agents for disclosed principals.

PARTICULARS

i. That the 1st Appellant having acted throughout the course of the transaction relating to the sale of Nos 16, 16A Sani Abacha Street and No. 2 Rock Street, Freetown respectively as solicitor for the purchasers of the said property, a fact uncontroverted, the Learned Judge, in holding that there is a cause of action against the 1st Appellant failed to appreciate the law relating to acts in regard disclosed principals thereby arriving at a flawed conclusion.

ii. That the Learned Judge erred in law and in fact and was wrong to hold that the four beneficiaries of the property at Nos. 16, 16A Sani Abacha Street and No 2 Rock Street, Freetown respectively acted through the 1st Appellant herein in receiving their share from the 2nd instalment of USD500,000 in view of the facts before the court.

2. That the Learned Judge erred in law and in fact and misdirected himself when he held that the action is founded on the 1st Respondent's role as administrator.

PARTICULARS

That the Learned Judge completely misconstrued the fact that the 1st Respondent did not throughout the course of the trasaction in regard the properties at Nos 16, 16A Sani Abcaha Street and No 2 Rock Street, Freetown respectively, act as Administrator but acted merely as a beneficiary of the estate of his deceased father.

3. That the Learned Judge erred in law when he held that once the 4 beneficiaries of the aforesaid properties had appointed

the 2nd Respondent it was not open to them to appoint another person to act for them in regard the estate of their deceased father.

4. That the Learned Judge gave his decision per incuriam.

3. The relief sought by the Appellants is:

(a) that the Ruling of EDWARDS, J of 3 July,2013 be set aside

(b) That the statement of claim of the 1st Respondent be struck out and the action against the Appellants be dismissed on the following grounds:

i. The 1st Respondent does not have a cause of action against the Defendants.

ii. The action is an abuse of the process of the Court and is frivolous and vexatious.

iii. That the said Appellants having acted to the knowledge of the 1st Respondent as agents for disclosed principals, an action cannot be maintained against them.

(c) Any other order(s) that this court may deem fit and just.

(d) That the costs of this appeal and the action below be borne by the 1st Respondent personally, such costs to be taxed and paid by the 1st Respondent to the Appellants.

4. We note that Counsel who settled the grounds of appeal, has used the descriptions '*Defendant* and '*Respondent* interchangeably, but we think and we understand that he is referring in all of these cases to the 2nd Defendant in the Court below, as the 1st Appellant in this Court, and to the Plaintiff in the Court below, as the 1st Respondent in this Court.

THE WRIT OF SUMMONS

5. By writ of summons – (pages 1 -5) - issued on 26 March,2013, the 1st Respondent brought a claim against the Appellants and the 2nd Respondent. The 1st Respondent sued in his capacity as Administrator of the estate of his deceased father. The 2nd Respondent was sued in his capacity as Attorney for the Mother and sisters respectively, of the 1st Respondent. The claim was for the recovery from the Defendants therein, jointly and severally, of the sum of USD48,000 plus interest on that sum at the rate of 8 per centum per annum with effect from 30 September,2012 until payment. The particulars of the claim – (pages 2 -3) - were as follows: On 30 September,2012 there was a meeting in the chambers of the Plaintiff's then Solicitor, where certain conclusions were

reached as regards the sale of the properties belonging to the estate of the deceased intestate, Ibrahim Basma, and as to the distribution of the proceeds of sale. Pursuant to the agreement reached between the participants at that meeting , the 1st Respondent sold these properties. A deposit of USD500,000 was paid to him. Out of that amount, he paid out USD220,000 to the 2nd Respondent. The remaining sum was paid out as fees to Solicitors and/or agents. At the time, the 1st Appellant was Solicitor for the purchasers of the property, but was not present at the meeting in Mr Charles Margai's office. The second instalment of USD500,000 was paid over to the 1st Appellant by the purchasers, The 1st Appellant wrongfully, did not pay over this amount to the 1st Respondent. Instead, he wrongfully paid over the sum of USD320,000 to the 2nd Appellant. The 1st Respondent also deducted the respective sums of USD100,000 as payment to the National Revenue Authority; USD77,000 to Mr Margai; and the sum of USD3,000 in his favour. The 2nd Appellant was not related to, nor was he the appointed Attorney of the beneficiaries resident abroad. The Respondents had no power to make and to receive these payments, and had thus turned themselves into '*Administrators de son tort*' by their conduct. According to the agreement reached at the meeting, each beneficiary, including the 1st Respondent, was to receive the sum of USD125,000. The 1st Respondent only received the sum of USD77,000, and the sum of USD48,000 was therefore due and owing to him. The 1st Respondent, through his Solicitors, demanded payment of this latter sum of money from the 2nd Respondent (the 1st Defendant in the Court below) - not the 1st Appellant - but the 2nd Respondent has failed or refused to make good the same.

ENTRY OF APPEARANCE

6. On 3 April,2013 C F Edwards esq, entered appearance for the 2nd Respondent, and gave notice of the same to the 1st Respondent's Solicitors the same day. On 4 April,2013, Yada Williams & Associates, of which, the 1st Appellant is partner, entered appearance for both Appellants, and gave notice of the same to 1st Respondents' Solicitors the same day.

APPELLANTS' NOTCIE OF MOTION OF 9 APRIL,2013

7. By Notice of Motion dated 9 April,2013, the Appellants applied to the Court below for certain Orders, to wit, : (1) That the statement of claim

be struck out and the action dismissed on the following grounds: (i) the Plaintiff does not have a cause of action against the said Defendants; (ii) The action is an abuse of the process of the Court and is frivolous and vexatious;(iii) that the said Defendants having acted to the knowledge of the Plaintiff as agents for disclosed principals, an action cannot be maintained against them. (2) That further proceedings in this matter be stayed pending the hearing and determination of this application. (3) Any other order(s) that this court may deem fit and just. (4) That the costs of this application be borne by the Plaintiff personally, such costs to be taxed and be paid by the Plaintiff to the 2nd and 3rd Defendants. The Application was supported by the affidavit of Osman Jalloh, the 1st Appellant herein, deposed and sworn to on 9 April,2013. Several documents were exhibited to that affidavit.

1ST APPELANT'S 1ST AFFIDAVIT

8. The 1st Appellant deposed and swore to the following facts: By a contract of sale made between the 1st Respondent and his mother and sisters of the one part, and Alhaji Amadu Jalloh and Alhaji Abdulai Jalloh of the other part the properties at 16 & 16A Sani Abacha Street and 2 Rock Street, Freetown, respectively were sold to the latter. The 1st Appellant sold these properties as beneficiary of his late father's estate. His father died testate. He, Mr Jalloh handled the sale on behalf of the purchasers. USD500,000 was paid to Yada Williams & Associates as a deposit. 1st Respondent's Solicitors were paid the sum of USD175,000. The sum of USD220,000 was paid to the 2nd Respondent on behalf of the mother and sisters of 1st Respondent. The sum of USD50,000 was paid to Solicitors acting for the Vendors as fees; the remaining sum of USD55,000 was paid to the 1st Respondent. A deed of conveyance was prepared by Yada Williams & Co. It was executed by 1st Respondent, and also by his mother and sisters abroad. After execution, the mother and sisters informed Yada Williams & Associates that the deed was with the 2nd Appellant and that the same would not be released to the purchasers unless their share of the proceeds was paid over to the 2nd Appellant. This fact was communicated to their Solicitors and to the 2nd Respondent. The purchasers' agents then paid over to the 2nd Appellant the sum of USD320,000 to be divided into four parts of USD80,000 for the mother and three sisters. 2nd Appellant issued a receipt for the funds received – exhibit "H" – page 42 of the Record. It reads: "*I, Jihad Swaid*

of No.1 Wilberforce Street, Freetown acknowledge the receipt of the sum of US$ 320,000.00.....from Alhaji Abdulai Jalloh in regard the sale of No.16, 16A Sani Abacha Street and 2 Rock Street, Freetown on behalf of NADIA BASMA, ZEINA BASMA, NABILA BASMA and MIRVAT BASMA all resident in the United Kingdom. Dated 2nd October,2012. JIHAD SWAID." The 2nd Appellant's signature appears above his printed name. As a result of this payment, only the sum of US$80,000 was due the 1st Respondent. The 1st Respondent was asked when the tenants of the properties were due to leave. He told the purchasers they were due to leave on 31st December,2012. He wrote a letter dated 21st August,2012, to this effect - exhibit J - page 43 of the Record. The letter was addressed to the 1st Appellant. 1st Appellant's firm in turn wrote to the tenants, passing on the information they had received from the 1st Respondent, and requesting confirmation of the same. Thereafter, one of the tenants, Yassin Jalloh tendered to 1st Appellant, receipts showing that he had paid 1st Respondent rent for the period upto 30 April,2013. They are exhibits L1 & L2" respectively and are at pages 46 &47 respectively. "L1" is dated 20 April,2012 and evidences the payment of rent for a shop in the sum of US$8,000 for the year 2012/2013. "L2" bears the same date and is for the sum of US$1,000 being rent for the period 2012/2013 for the store. Clearly, at the time, i.e. August,2012, he wrote exhibit "J", 1st Respondent well knew he was telling a lie. As a result of this legerdemain or trickery played on them by 1st Respondent, they, the purchasers, instructed their agent to demand a deduction of the sum of US$3,000 from the sum of US$80,000 due the 1st Respondent. So, only the sum of US$77,000 was available for payment to the 1st Respondent. By letter dated 4 October,2012 - exhibit M - pages 48&49 - C F Margai & Associates, quondam Solicitors for the 1st Respondent, were informed of the deduction made. On 5 October,2012, 1st Respondent sent 1st Appellant a text message through his cell phone, number 033 433 326. The text read: "*Mr Yassim Jalloh rent is due in march 2013 and not December 2013. Why should u deduct $3000*".

9. Subsequently, the other tenants protested to 1st Appellant's firm that their respective terms of tenancy would not expire on 31st December,2012. Pursuant to the agreement signed in the chambers of Charles Margai & Associates - exhibit F - pages 27&28, the sum of US$100,000 was paid in its equivalent in Leones, by the purchasers to the

National Revenue Authority as withholding tax. A copy of the receipt issued by the NRA is exhibit N - page 50.

10. There is another affidavit, deposed and sworn to by the 2nd Appellant on 15 April,2013 - pages 51&52 of the Record. In his affidavit, the 2nd Appellant deposes that he was requested by the beneficiaries to receive the sum of US$320,000 from Alhaji Abdulai Jalloh, and that reluctantly, he did so. He issued the receipt exhibited to Mr Jalloh's affidavit as "H". He remitted the funds received, to the beneficiaries. He did not benefit in any way from the sale transaction. His role was confined to receiving funds, and repatriating the same. These facts were not challenged by the 1st Respondent.
11. Mr Jalloh deposed and swore to a further affidavit on 15 April,2013. To that affidavit, is exhibited as "P" a copy of the executed contract of sale, the unsigned version of which had been exhibited as "D" to his first affidavit. He also exhibited a copy of the deceased testate's Will as "Q".
12. The 2nd Respondent also filed a Notice of Motion dated 19 April,2013, asking for reliefs similar to those prayed for by the 1st Appellant - pages 61 -75.
13. The 1st Respondent deposed and swore to an affidavit in opposition on 22 April,2013 - pages 76 - 78. He deposed to the following matters: He was the Administrator of his late father's estate, having obtained a Grant on 28 July,2008. He referred to paragraphs 3, 7 & 11 of the memorandum of agreement exhibited to Mr Jalloh's affidavit as "F". To the best of his information, knowledge and belief, the other beneficiaries appointed the 2nd Respondent as their Attorney and this power has never been revoked. A copy of the Power of Attorney is exhibited as "BB3" - pages 86 - 88. The 1st Appellant knew at the time he paid over the sum of USD320,000 to the 2nd Appellant, that the 2nd Respondent was very much alive and quite capable of executing his duties as Attorney. 1st Appellant knew he was the Administrator of his late father's estate, yet still he chose to pay over monies to a complete stranger, the 2nd Appellant who had no authority to intermeddle in the estate. The payment of the second tranche of US$500,000 constituted final payment of the purchase price for the properties. The first tranche had been paid to him. He had paid "*both Solicitors*" and paid the balance of $220,000 to Mr Huballah (2nd Respondent)." Prior, to this transaction for sale, there had been a letter of commitment dated 6 October,2009 exhibited as "BB4" - page 89. He ended up be deposing that in the Supreme Court matter, 1st Appellant's

firm had represented Mr Wanza who had lost the appeal. For these reasons, he asked that the Application be dismissed. We have looked at the so-called 'letter of commitment'. It is open-ended, and does not add any weight to the 1st Respondent's claim in the lower Court, since he had clearly accepted the offer made by 1st Appellant's firm's clients. We note also, that 1st Respondent did not allege that his mother and sisters had complained to him about not receiving the monies due them.

14. These were the facts with which EDWARDS,J had to deal. It seems to us that there were only four issues involved in the action (1) Was 1st Respondent entitled to a payment of the sum of USD125,000 out of the proceeds of sale of the three properties ? (2) And if so, why? (3) Was 1st Appellant right to have paid the total sum of USD320,000 to the 2nd Appellant for and on behalf of the mother and sisters of the 1st Respondent? (4) Did 1st Respondent have the right to determine, in his capacity as Administrator of his late father's estate, the person to whom payments in respect of the other beneficiaries should be made? If questions (1) and (4) were answered in the negative, and question (3) in the affirmative, the 1st Respondent really had no case against both Appellants. But we shall now move on to the Law relating to dismissing an action on the grounds contended by the Appellants.

ORDER 21 RULE 17 HIGH COURT RUKES,2007.

15. Order 21 Rule 17 of the High Court Rules,2007 - HCR,2007 - provides as follows:

"17(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the grounds that:-

(a) It discloses no reasonable cause of action or defence, as the case may be;

(b) It is scandalous, frivolous or vexatious;

(c) It may prejudice, embarrass or delay the fair trial of the action;

(d) It is otherwise an abuse of the process of the Court

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

(2) An Application under this Rule shall be deemed to invoke the inherent jurisdiction though not mentioned as well as that given by this rule.

The Appellants' Application in the Court below, was based on paragraphs (a), (b) and (d) though the adjective *"reasonable"* was omitted in their paragraph 1(1) and the adjective "*scandalous*" was also omitted from their paragraph (ii). Also, they compressed paragraphs (b) and (d) into one paragraph. Our view is that if the Court comes to the conclusion that the action brought by the 1st Respondent could be categorised in terms of paragraphs (a), (c) & (d) above, there the matter should end. The Appellants' sub-paragraph 1(iii) constitutes part of the proof that the 1st Respondent had no reasonable cause of action against them.

THE JUDGMENT

16. The Judgment of the Learned Presiding Judge is to be found at pages 111-117 of the Record. We note that at the commencement of the same, the Learned Judge has left out the ground relating to abuse of process, but we note also that on the following page, that is page 112, he does refer to it.

ENGLISH ORDER 18 RULE 19

17. To find out what the Law is on this subject of dismissal of an action, we refer to the English Supreme Court Practice, 1999 "*White Book", 1999".* Order 18 Rule 19(1) of the English Rules,1999 is ipssima verba our own Order 21 Rule 17(1), and the notes thereto constitute persuasive authority as to its interpretation. The English Rule 19 has a sub-rule (2) which is omitted in ours. The English Rule is that "*No evidence shall be admissible on an application under paragraph (1)(a)*" – i.e. the "*no reasonable cause of action*" ground. Our own Rule (2) states: "*An Application under this rule shall be deemed to invoke the inherent jurisdiction though not mentioned as well as that given by this rule.*" This Rule is omitted from the English Rules, but its importance is acknowledged and recognised as a reading of the notes to the English Rule at paragraph 18/19/26 will show.
18. To move on to the procedure, "*...although the Rule expressly states that the order may be made "at any stage of the proceedings....", still the application should always be made promptly, and as a rule, before the close of pleadings. Where the statement of claim is being attacked, the application may be made before the defence is served" - note 18/19/3.* In this case, the writ of summons was issued on 26th March,2013. Appearance was entered on behalf of the Appellants on 4th April,2013. The Application was filed on 9th April,2013. As such, it was promptly done.

19. Note 18/19/4 states that: "*The application should specify precisely what order is being sought, e.g. to strike out or to stay or dismiss the action or to enter judgment, and precisely what is being attacked, whether the whole pleading or indoresment or only parts thereof, and if so, the alleged offending parts should be clearly specified. The application may be made on any or all of the grounds mentioned in this rule, but such grounds must be specified.*" Page 10 of the Record shows that the Appellants have complied with this requirement as well.

NO REASONABLE CAUSE OF ACTION

20. As we have stated above, the English Order 18 Rule 2, is not replicated in our Rules. Because of that Rule, the practice in the English Courts is that no evidence is admissible to support the contention that there is no reasonable cause of action. In our jurisdiction therefore, evidence should be admissible. But we should bear in mind at all times that if a defendant to an action contends that the plaintiff's claim contains no reasonable cause of action, this should be quite apparent on its face, without the necessity of examining the claim in detail. Our own Rules do not require the exclusion of affidavit evidence , but we shall ensure that we do not minutely examine the evidence. The manner in which the English Court would exercise its powers under this head, i.e. the "no reasonable cause of action" head, is explained in note 18/19/6: "*It is only in plain and obvious cases that recourse should be had to the summary process under this rule.....It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action.*

21. This Rule has engaged our Courts in the past, and we will here refer to a Judgement of the High Court delivered on 15th August,2014 by BROWNE-MARKE,JA in C.C. 195/14 JOHNNY v TOTAL (SL) LTD.As to what is a reasonable cause of action, it is "*a cause action with some chance of success when only the allegations in the pleading are considered.....So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge.....,the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out." In my Judgment delivered in April,2012 in the case of C.C. 261/11 - HORSE IMPORT AND EXPORT COMPANY LIMITED v INSPECTOR-GENERAL OF POLICE & THE UNDER-SHERIFF & IBRAHIM BAZZY & SONS, I explained what the Law is, in this respect: "The*

position (as in the English jurisdiction) is very much the same in the sister Federal Republic of Nigeria as is stated in FIDELIS NWADIALO's CIVIL PROCEDURE IN NIGERIA 2nd Edition. At page 426 of his monograph, the Learned Author says this: "A pleading discloses a reasonable cause of action or defence if, on the facts alleged in it, the claim or defence has some chance of success.....For a pleading to be said to disclose no cause of action, it must be such as nobody can understand what claim he is required to meet. The case stated on it must be unsustainable or unarguable or the cause ~~of cause~~ of action is 'uncontestably' bad. When considering the issue of disclosure of cause of action, it is irrelevant to consider the weakness of the plaintiff's claim; what is important is to examine the averments in the pleadings and see if they disclose cause of action or raise some questions fit to be decided by a Judge." At page 427 it is stated: "The procedure is only appropriate to cases which are plain and obvious so that the Court can say at once that the statement of claim, as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks." It was for this reason, the plaintiff failed to have the defendants' defence struck out as disclosing no reasonable defence in the case of KEISTER v MUSTAPHA & ANOR [1964-66] ALR SL 47 H.C. DOBBS,J presiding. At page 51 LL28-33 DOBBS,J said: " To sum up, I am of the opinion that on the present state of the pleadings there are triable issues in the action, especially in view of the denials of the defendants. I do not think this is a plain and obvious case for me to exercise my summary powers of striking out or of giving judgment on admissions.".

22. It is our view that, a cursory examination of the writ of summons would have made clear to the Learned Judge that the 1st Respondent had no reasonable cause as he had not brought the action in a representative capacity, whilst he was at the same tile claiming, in his particulars of claim, that he was entitled to an additional amount of money, to cover "*administration expenses*". At the bottom of page 114 to the top of page 115 of the Record, the Learned Judge said this: "*For me in this case the issue is which indeed is the 2nd issue is whether the Plaintiff was an Administrator. Exhibit F is clear that the foundation for the distribution of proceeds of the sale is that the Plaintiff is an Administrator even though he was to benefit and also Vendor. But over and above that there is exhibit BB1 and exhibit A which shows in what capacity the Plaintiff had sued which is as Administrator.*" Towards the bottom of page 115, the

Learned Judge had this to say as well: "*The action as I see is founded in the Agreement exhibit F and in the Plaintiff's role as Administrator.*" This was a most erroneous conclusion, in all respects. First, because of the provisions of Order 6 Rule 4(1) of HCR,2007: "*Before a writ is issued it shall be indorsed - (a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues.....*" The writ in this case bore no such indorsement. It could not have proceeded to a successful conclusion in the Court below, without an amendment. Second, in his affidavit deposed and sworn to on 9 April,2013, the 1st Appellant deposed: "*That the said Plaintiff cannot be the Administrator of the estate of Ibrahim Abdul Hussien Basma (deceased) as the deceased died testate.*" In his second affidavit deposed and sworn to on 15 April,2013 1st Appellant exhibited the Will of the deceased as exhibit "Q". The 1st Respondent was not named as an Executor in that Will. The Executors were named therein. Two of the beneficiaries, Zeina Basma Idriss and Nadia Basma, were named as Executors. There was no affidavit evidence before the Learned Judge that any or all of the Executors had renounced executor-ship or probate. So, the issue of obtaining a Grant of Letters of Administration, never arose. The 1st Respondent's case was therefore extremely weak, and had very little or chance at all of success as it stood at the time. We say so irrespective of the fact that the particulars of claim were couched in terms of breach of professional and/or fiduciary duty on the part of the 1st Appellant. The fact that the Appellants, in their respective affidavits deposed and sworn to in support of the Application in the Court below, went to great lengths to explain the respective roles each of them played in the sale of the properties, was, in our view, totally unnecessary, and perhaps misled the Learned Judge into thinking that there were triable issues between them and the 1st Respondent.

FRIVOLOUS AND VEXATIOUS

23. We now turn our attention to the second ground canvassed by the Appellants in the Court below, that the action was frivolous and vexatious and constituted an abuse of the process of the Court. We shall divide them into two parts as provided for in our Rules: *frivolous and vexatious and abuse of process.* Beginning with Note 18/19/16, it states: "*By these words are meant cases which are obviously frivolous or vexatious, or, obviously unsustainable.....For instance, it is vexatious and wrong to make*

solicitors, or others, parties to an action merely in order to obtain from them discovery of costs." We might add, " *or, in order to recover monies paid to persons well known to the 1st Respondent, and who are in fact his kith and kin and who were co-beneficiaries with him in respect of the proceeds of sale of the deceased husband and father.*" The note goes on further to state that: "*But a judicial discretion must be used in determining whether the proceedings are vexatious. The pleadings must be so clearly frivolous that to put it forward would be an abuse of the process of the court.*"

24. If we turn to the facts averred in the 1st Respondent's statement of claim at pages 1-5, and to the documents he refers to in the particulars of claim, it would be clear that he really had no cause of action against the Appellants. He brought the action purportedly, in his capacity as Administrator of his late father's estate. Yet, there is no averment that he obtained a Grant from the High Court, nor, was there any evidence before the Learned Judge that he was such. He bases his claim (see paragraph 3 of the statement of claim on pages 2-3) on the minutes of the meeting held in the chambers of Mr Margai on 30th March,2012. He is included in the description, beneficiaries, in paragraph 1 of the agreement reached at that meeting. He is not described as Administrator in any part of the minutes. In paragraph 9 of his statement of claim at page 4 of the Record, he avers:" *As stated in paragraph 3 above the proceeds of sale of the aforesaid properties were to be shared equally between all the beneficiaries after making certain provisions for further administration of the estate of the deceased intestate. According to the agreement above, the plaintiff and other beneficiaries were each to receive $125,000.*" We have pointed out above that there was no evidence before the Learned Judge that the 1st Respondent was Administrator of his father's estate, and that he could not have been one, as there were known and existing Executors who had not renounced probate. Second, paragraph (4) of the agreement adverted to by him in his particulars of claim at the top of page 3, states: "*that the withholding tax due National Revenue Authority (NRA) which by law is 10% of the purchase price, the same to be paid from the purchase price before registration of the conveyance.*" After deduction of solicitors' fees, paragraph (7) of that agreement states: "*the remaining sum to be shared equally amongst the beneficiaries making provision for the administration of the remaining estate.*" Clearly, the 1st Respondent agreed that withholding tax of 10%

was to be paid to the NRA as required by Law, and that Solicitors fees would also be deducted. He had, and has no quarrel with those deductions as is apparent on a reading of paragraph 4 of his particulars of claim at page 3. And if that were so, the beneficiaries, five of them, would be left with only USD400,000 to be shared out amongst themselves. This would mean each party would receive USD80,000. 1st Appellant explained in his first affidavit, the reason why the sum of USD3,000 had been deducted from 1st Respondent's share: he had played a deception on 1st Appellant's firm, and on the purchasers whom they were representing: he had lied about the time the various tenancies would expire. He had received rent for a period extending after ownership of the properties would have changed hands, and he had not declared this. It was the purchasers who made the deduction and not 1st Appellant. 1st Appellant informed 1st Respondent, and 1st Respondent's then Solicitors, of this. 1st Respondent did not deny the wrong-doing: he attempted in his text message (paragraph 20 of 1st Appellant's first affidavit) sent to 1st Appellant, to side-step the issue. We should have thought that the Learned Judge should have, in his Judgment, rebuked 1st Respondent for doing this, rather than encouraging him to believe that he had been wronged: that he had been short-changed. We think that this was an error on the Learned Judge's part.

ABUSE OF PROCESS

25. Lastly, we will now deal with the ground of abuse of process. Note 18/19/18 of the White Book,1999 states: "*... This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery, and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation..... the categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be material.*" In our view, the circumstances we have set out above, amply show that the 1st Respondent's claim lacked merit from its outset, and that it really had no chance of success. It was embarked upon to embarrass and probably, to extract an additional sum of money from the Appellants. Particularly the 1st Appellant, with specious accusations that he had acted unprofessionally in the whole matter.

PER INCURIAM

26. The 4th Ground of Appeal is that the Learned Judge gave his decision per incuriam. Per incuriam means through want of care, or, without the relevant authorities being cited to a Judge presiding over a matter. In WILLIAMS v FAWCETT [1985] 1 All ER 787, CA, Sir John Donaldson, MR, said: "*As a general rule, the only cases in which decisions should be held to have been given per incuriam, are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some binding authority on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is, on that account, to be demonstrably wrong....*" As regards the non-citing of the relevant or inconsistent statutory provisions, there were really known. Counsel for the Appellants was as much to blame, as the Court. The duty of Counsel at the Bar, is to cite to the Court, all authorities relevant to the issues for decision, whether they be in his favour, or against. Counsel was, instead, occupied with the principles of the Law of Agency, which meant examining the 1st Respondent's claim in detail rather than with the principles surrounding Order 21 Rule 17 which was what the Application in that Court was about. We shall therefore dismiss this particular ground of appeal.

FINDINGS

27. For all of these reasons, it is our view that the appeal of both Appellants should succeed. We do not think it necessary to grant the third relief prayed for by the Appellants at page 126 of the Record, as we do not believe that it was necessary for the High Court to have gone into that matter on the basis of the Application before it. We therefore Order as follows:

ORDERS:

I. The Appellants' appeal against the Decision of the Honourable Mr Justice D B Edwards made on 3rd July,2013, is allowed. That decision is set aside in its entirety

II. The Statement of Claim of the 1st Respondent in the Court below, is struck out and the action against the Appellants is dismissed on the following grounds:

(a) The 1st Respondent does not have a reasonable cause of action against the Appellants.

(b) The 1st Respondent's action is frivolous and vexatious and is an abuse of the process of the Court.

III. The Appellants shall have the Costs of the appeal and of the action in the Court below, such Costs to be paid by the 1st Respondent personally. And such Costs to be taxed, if not agreed.

IV. There shall be no Order as to Costs against the 2nd Respondent.

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

THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MRS JUSTICE A SHOWERS
JUSTICE OF APPEAL