Misc. App 45/2014

IN THE COURT OF APPEAL OF SIERRA LEONE

Estate of Khalilu Jabbie *(Represented by* ***Mr. Bockarie Ensah*** *as Court appointed Administrator of the Estate of the deceased Khalilu Jabbie)*	-	APPELLANT/RESPONDENT
AND		
Skye Bank (SL) Limited	-	RESPONDENT
AND		
Mohamed Bobo Bah	-	INTENDED PARTY/APPLICANT

CORAM;

HON. JUSTICE VIVIAN M.SOLOMON JSC (**PRESIDING**)
HON.JUSTICE MANGE DEEN-TARRAWALLY JA
HON. JUSTICE REGINALD SYDNEY FYNN JA

Counsel;
O. Jalloh Esq for the Intended Party/Applicant
M.P Fofannah Esq for the Appellant/Respondent
R S V Wright Esq for the Respondent

RULING dated 9th .....December 2016

FYNN J.A

1. The present application has been brought by the "Intended Party"/applicant who seeks *inter alia* for an order to be joined as a party to the on-going appeal. The application is supported by an affidavit sworn to by the applicant. The 1st Respondent vehemently opposes the application and seeks to cross examine the applicant on his affidavit in support of it. The second respondent (bank) for its part has informed the court that it supports the application. The applicant having moved the court the 1st respondent cross- examined the applicant on his affidavit

and the 2nd respondent now wishes to cross-examine him too which the 1st respondent objects to.

2. The right to cross-examine a witness in a trial may be viewed as one of the incidentals of the maxim *audi alterem partem* which is one of the fundamental rules of natural justice. The other side must not only be heard but must be heard as wholly and completely as is possible in the circumstances. To achieve this it is necessary for the other side to have a say in the testimony of each witness brought by the opposing side. No better way has been adopted to reach this result than to have a party put questions to the opposing side's witness (es). These questions are put with a view to impeaching the testimony of the witness, controverting his facts through his own lips or getting him to admit material aspects of the cross-examiner's case.

3. Cross-examination must necessarily be adversarial. The point is obliquely made in the American case of **Evitts v. Lucey, 469 U.S. 387 (1985)** *"The very premise of our adversary system ..... is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free"*. Though that was a criminal case the same principle holds true in the civil courts too. The cross-examiner is not however expected be a friendly adversary who shares the witness' bed. Such a situation will not aid the machinery of justice as it is known and practiced in common law jurisdictions.

4. Where the witness and the cross-examiner are pally in their purpose, the cross-examiner will merely lead the witness to confirm his previous testimony- cure any lapses or perceived defects; a self-serving exercise. The crucial and necessary ingredient of genuine partisan truth seeking should always be present in cross examination otherwise the exercise would have been robbed it of its very essence. This point is also made subtly in **Phipson on Evidence** para 12-09 *"..whether the right to cross examine survives if the cross examiner afterwards calls his opponents witness to prove his own case seems doubtful* ***but the better opinion is that it does not****: and that the witness cannot be asked leading questions on his second examination ....."*

5. It cannot be denied that every defendant in a trial is entitled to cross-examine a witness produced by the opposing side. By being on the opposite side of the matter this right to cross-examine the witnesses of the other side automatically accrues to the respondents and to each of them. This position is captured in **Halsburys' Laws of England Vol. 15 Para 800 at pg 444** under the rubric *"time and scope of cross-examination"* which reference the respondent bank relies on heavily supporting its claim to cross examine the deponent.

6. However in that same reference if the respondent bank were to read a little further an interesting and useful point is also made in respect of a co-defendant's right to cross examine to wit that : *"A defendant may cross-examine a co-defendant or any of the witnesses of his co-defendants* ***if his co-defendant's interests are hostile to his own"*** It would appear to me therefore that the right to cross examine does not persist where the party who would otherwise have had that right does not in fact have an interest in the issue at stake which is at variance with the interests of the witness or the party who had called the witness. (see **Dunhill Exparte Dunhill 1894 29L Jo 368** as quoted by Halsbury's Laws of England 3rd Edition)

7. It is also crucial to distinguish between the right to cross examine the witness in a trial and that claimed by the respondent bank to cross examine a deponent in the hearing of an interlocutory application. The former is an undisputable right in our legal system subject to certain specific exceptions but I cannot say the same for the latter; as Interlocutory applications usually rely on affidavit evidence.

8. I have found no peremptory entitlement to cross examine a deponent on his affidavit in support of an interlocutory application such as this one. The Rules of this court do not provide for any such right to cross examine the deponent on his affidavit nor do the Rules of the Court below confer such a right. This right once existed in our jurisdiction, under the old rules of the High Court but the new rules (ie the High Court Rules 2007) have not re-enacted that entitlement. It is my opinion therefore that, leave to cross-examine a deponent on his affidavit in an interlocutory application such as this one will lie at the court's discretion only.

9. Where in the course of hearing an interlocutory application, a respondent has crossed over to the applicant's side and has aligned himself with the applicant asserting that he (i.e. the respondent) supports the application or is impartial to it. It is my opinion that such a respondent remains a respondent in name only for the purposes of that application. In essence that respondent has truly become a *"co-applicant"*. To allow him to cross-examine a witness brought by the applicant with whom he has pitched his tent will not only be a farce but has the potential to weaken significantly the whole effort of seeking justice.

10. Counsel for the respondent bank has attempted to distinguish between adopting parts of the Intended Party/Applicant's submissions and adopting the Intended party's application to be joined in the appeal. I fail to see the distinction and not for want of trying. There can be no half way house on this issue. A party is either opposed to the intended party being joined in the appeal or the party agrees for him to be joined. My records are clear that the respondent bank supports the application for the intended party to be joined and my conclusion flows from this premise.

11. It is no surprise that the respondent bank has allied itself to the intended party/applicant for the purposes of this application (which is brought to join the latter as a party to this appeal). Considering that the bank created the interest upon which the applicant now relies, it is not expected that the respondent/ bank will, in cross-examination, seek, on the one hand to deny the interest which it had created whilst on the other support the same party to be joined in the appeal. It will follow therefrom that the respondent bank cannot "cross-examine" the intended party/applicant. It is in fact incapable of doing so in the proper sense.

12. I note that counsel for the applicant/Intended Party has submitted that his client's interests are not necessarily the same as those of the respondent bank. I find that on the question of whether the intended party is to be joined to the appeal or not they (ie intended party and the bank) both have the same answer thereby clouding any difference in interests which they may claim to have on this

limited question. I find that on the question of whether the intended party is to be joined in this appeal the respondent bank has no interest which is "hostile" to that of the applicant.

13. Counsel for the respondent's submissions on indemnity may prove to be of great significance when we come to consider the substantive application or indeed the appeal. It is my opinion however that in deciding the narrow question of whether or not the respondent bank should be allowed to cross-examine the applicant on his affidavit in support there is no need for recourse to the law of indemnity.

14. Should a respondent who supports an application be allowed to approbate and reprobate? Can he join the applicant whilst at the same time asserting his perceived rights as a respondent? I will answer both questions in the negative. A party in circumstances such as those presented in this application, must choose a side and stay there.

15. For these reasons and in the absence of authorities to the contrary, (such as was promised by counsel but not received), this Court will not allow the respondent/bank to cross-examine the deponent.

The application of the respondent/bank to cross examine the deponent/applicant/intended party is hereby refused.

HON. JUSTICE R. S.FYNN JA -.....

HON. JUSTICE V.M.SOLOMON JSC-.....

HON.JUSTICE M. DEEN-TARRAWALLY JA -.....