IN THE COURT OF APPEAL OF SIERRA LEONE

CIVIL DIVISION

CIV. APP. 71/17

HORSE FISHING CO. LTD — APPELLANT

AND

THE ATTORNEY-GENERAL & MINISTER OF JUSTICE — RESPONDENT

REPRESENTATION:

OSMAN I KANU ESQ. COUNSEL FOR THE PLAINTIFF/RESPONDENT

C.F. MARGAI ESQ.& M.P. FOFANAH ESQ. COUNSEL FOR THE DEFENDANT/APPELLANT

CORAM:

HON. MR. JUSTICE REGINALD S. FYNN JA (PRESIDING)
HON. MR. JUSTICE SENGU M KOROMA JA
HON. MR. JUSTICE ELDRED TAYLOR-KAMARA JA

JUDGMENT DELIVERED ON THE 20TH APRIL, 2018 BY THE HON. MR JUSTICE SENGU M KOROMA JA

1. The Respondent in this appeal, the Attorney-General and Minister of Justice is the principal Legal Adviser to the Government of Sierra Leone, the Lessor of all that state land and premises situate, lying and being at Jui Hastings, Greater Freetown in Western Area of the Republic of Sierra Leone. The said land was by indenture of a lease and supplemental lease dated the 20th October, 2003 registered as No. 150/2003 at page 11 volume 96 and 9th December, 2014 registered as No. 241/2014 at page 106 in volume 112 respectively of the Book of Leases kept in the office of the Registrar-General, Freetown (hereinafter referred to as the' Lease') to the Appellant herein, Horse Fishing Company for a term of 50 (fifty) years upon the terms and conditions stated therein.

By a Writ of Summons dated the 17th day of June, 2016, the Respondent instituted proceedings against the Appellant seeking the following relief:

i. An Order for immediate possession of the premises situate lying and being at Jui Hastings, Greater Freetown in the Western Area aforesaid as the lease previously held by the Respondent has been forfeited but continues to hold and occupy the said premises.
ii. An Order for the cancellation of any other interest in the aforesaid premises
iii. Damages for breach of contract
iv. Any other or further Orders that this Court may deem fit
v. Cost

2. The Respondent in its defence did not admit that the Plaintiff was entitled to possession of the said land and premises and averred that the

Government through the Ministry of Lands, Country Planning and the Environment were only entitled to the reversionary interest as Lessors.

3. The Appellant admitted that the Appellant correctly described the premises in its particulars of claim and averred that in breach of the Principal and Supplemental Leases described above, the Respondent proceeded to lease the said premises to a third party notwithstanding the subsistence of lease Agreement between the Appellant and the Ministry of Lands, Country Planning and the Environment representing the Government of Sierra Leone.

4 The Appellant denied having breached clause 2 (x) of the Principal Lease or failed to comply with the covenant to repair, cleanse, uphold, maintain or keep in good and tenantable repair, the buildings and structures on the demised premises.

5. In view of the aforesaid, the Appellant counterclaimed as follows:

i. Damages for breach of contract

ii. Damages for wrongful interferance with quiet enjoyment of demises premises.

iii. A declaration that the Principal and Supplemental lease Agreements dated 21st October 2013 and 9th September, 2014 respectively be held to be valid and subsisting until its expiration.

iv. Cost.

6. In reply to the Defence, the Respondent contended that by virtue of Clause 4 (1) of the Lease Agreement, it had the right to re-enter and reposesss the demised premises in the event of a breach of any of the covenants contained in the said lease, which was the case in this instance as the Defendant had breached both clauses 2 (iii) and 2 (x).

7. It also contended that the Appellant sublet the premises without obtaining the required consent; the fact that the lease was terminated four months after it was signed was irrelevant.

8. The Respondent contended that the Appellant failed to develop the premises.

9. In the reply to counterclaim, the Respondent denied breaching any covenant and contended that the Appellant breached fundamental covenants in the lease Agreement.

10. It averred that the Lease Agreement was void ab initio as it did not comply with Section 4 (1) of the citizens (Interest in Land) Act, 1966.

11.The Appellant filed and issued a Judge's Summons dated 10th July, 2017 praying the High Court to grant the Orders prayed for in the counterclaim. The Respondent filed an Affidavit in Opposit6ion to the said application sworn to by Precious V. K Fewry on the 28th day of July, 2017. This was followed by a Supplemental affidavit sworn to on the 7th September, 2017. Exhibited to the said Supplemental affidavit was a letter of offer leasing a portion of the premises to a 3rd party, SABCO FISHING COMPANY.

12. The Judge's summons was moved on the 20th July, 2017 and responded to on the 1st August, 2017.

13. In her Judgment dated 12th September, 2017, the Learned Trial Judge, Hon. Justice A Wright J. made the following findings:

i) The Plaintiff/Respondent's conduct in its entirety in all the transactions with the parties, i.e the Plaintiff/Respondents and SABCO Fishing Company was unprofessional, haphazard, disjointed and conducted with

reckless disregard for the nature of the Defendant/Applicant's business and operations. The remedies employed to the perceived breaches of the lease agreement and their timing were not only unlawful but not practical and only served to complicate all the respective parties even further, two wrongs did not make right.

ii) The Lease Agreement dated 21st October, 2003 and the Supplemental Lease dated 9th December, 2014 respectively are void ab initio and thus not valid in law by the negligence of both the Plaintiff/Respondent and the Administrator General

iii) The Plaintiff/Respondent has to some extend interfered with the Defendant/Respondent's quiet enjoyment of the demised premises whose Employee/Management became involved in confrontation with the Defendant/Applicant. Furthermore, the purported termination of the lease and the subsequent withdrawal all served to confuse, scare and to some extend paralyse the Defendant/Applicant from continuing with its fishing operations and further investments as per its operational plan for 2017 which was prepared and submitted to the Ministry of Lands at their request.

iv) The 3rd party SABCO which the Plaintiff/Respondent offered a lease of portion of the demised premises was a bona fide or innocent purchaser for value. In the light of the lease, the party has also engaged in a not insignificant investment on the portion of the demised premises but is yet to execute a lease Agreement with the Plaintiff/Respondent; this, its own legal interest on the demised premises is also questionable as it has only complied with certain terms and conditions of the offer letter.

Based on these findings, the Learned Trial Judge Ordered as follows:

1. The Defendant/Applicant shall be granted a new Lease Agreement by the Plaintiff/Respondent (at its own cost as damages for the wrongful interference with the quiet enjoyment of the demised premises) from the date of this Order for the maximum statutorily required term and an option if it so desires at a rent in line with the

reviews that were provided for in the Lease Agreement dated 20th October 2003, the demised premises in the Lease Agreement shall be clearly demarcated by the Ministry of Lands and the Defendant/Applicant shall immediately erect a concrete wall on its boundaries.

2. The Plaintiff/Respondent shall ensure the full compliance of the terms and conditions of the offer letter to SABO Fishing Company dated 12th October 2016, including the clear demarcation of the Land area to be granted and Sabco shall, with immediate effect construct a concrete wall between its operating area and the Defendant/Applicant's area and establish a new and different Exit and Entrance to its operating area, different from the existing entrance and gates of the Defendant/Applicant.
3. The Defendant/Applicant shall have full and unfettered access to the Jetties at the Jui Fishing Complex and shall work out a timetable of operations with Sabco Fishing Company on its usage of the said Jetties.
4. The Ministry of lands shall carry out regular inspection/monitoring of the Jui Fishing Complex (including the Jetties) that shall be demised to both the Defendant/Applicant Sabco Fishing Company and shall involve the Ministry of Fisheries and Marine Resources for its expertise. Whenever so required.
5. Each party shall bear its costs.

14. On the 18th September, 2017, the Appellant filed notice appointing C.F. Margai & Associates as Solicitors in place of Tejan-Cole, Yillah & Bangura.

15. Being dissatisfied with the decision of the Trial Judge, the Appellant appealed to this Court against the whole decision on the following grounds:

1. The Judge having correctly evaluated the evidence in favour of the Defendant/Applicant erred in law in her findings and Orders which are at variance with the evaluation of the evidence aforesaid.

Particulars

(a) Page 3 under Judge's consideration and ruling paragraph 4: the Plaintiff/Respondent wrote to the Defendants solicitor on 16th June, 2016... In my mind the Plaintiff/Respondent should have come to the Court to obtain the necessary orders by proving the several breaches it was claiming.

Paragraph 5: The Plaintiff/Respondent proceeded to offer a leasehold interest to a third party (another fishing company6 SABCO Fishing Company)... A letter from the Plaintiff dated 11/2016 confirmed this conduct

(b)Page 4 paragraph 1: however, the Plaintiff/Respondent in 2007 wrote another letter to the Defendant/Applicant. If the Plaintiff/Respondent claims to have the right of re-entry and forfeiture of the lease, why then was it requesting an action plan from the Defendant/Applicant on its operations on the demised premises claiming diplomatic intervention?

Paragraph 2: The questions in my mind are ... are the principal and supplemental leases void in law, thus cannot be valid?

Paragraph 3: The Plaintiff/Respondent in its affidavit in opposition of 28th July, 2017... I have not been able to come across any clause whatsoever therein that can be considered as a clause to sublease the demised premise. Paragraphs 4,5,6 and 7 refers

(b) Page 5 –Paragraph 1: it thus follows therefore that the Plaintiff/Respondent had no right whatever to lease a portion of the demised premises to a third party ... And SABCO Fishing Company does not seen to have as valid lease agreement.

2. The Judge should in law have discountenance the Affidavit in Opposition sworn to by Precious V.K. Fewry at Freetown on the 28th July, 2017 together with the exhibits attached thereto as well as the Supplemental Affidavit in Opposition sworn to and filed by Precious V.K. Fewry at Freetown on the 7th day of September, 2017 as deponent and **Solicitor for the Plaintiff** on the grounds that both Affidavits contravene Order 59 of the High Court Rules C.1. No. 8 of 2007 which when juxtaposed with exhibit SES1 Writ of Summons dated 17th June, 2016 FTCC 170/2016 No. 49 issued by Osman I. Kanu, Principal State Counsel, as Solicitor for the Plaintiff, in the absence of a Notice of Change of Solicitor.
3. The title the Attorney-General & Minister of Justice as Plaintiff in the said proceedings is unsupported in law, considering that the office is a creature of statute with prescribed functions.
4. The Learned Judge having found in paragraph 1 of page 5 that the Plaintiff/Respondent had no right to lease a portion of the premises to a third party, even if the Defendant had breach the covenant of the lease agreement, the Learned Judge erred in law in not setting aside the said lease as well as ordering its expunction from the Deed of Leases registered in the office of the Registrar and Administrator-General and by extension, ordering the third party, i.e. SABCO Fishing Company to forthwith hand over possession of the portion of the premises purportedly leased by the Plaintiff/Respondent to them; this the Learned Judge failed to do.

Particulars

(a) Page 5 1: it thus follows therefore that the Plaintiff/Respondent had no right whatsoever to lease a portion of the demised premises to a third party... The Defendant/Applicant's lease may be void and SABCO Fishing Company does not seen to have a valid lease agreement.

16. In consequence, the Appellant sought the following relief:

(1) That the findings and Orders be set aside and one in favour of the Defendant/Applicant be substituted therefore,

(2) Such other or further reliefs to be granted to meet the Justice of the case &

(3) Costs

I have listened to my Lord Taylor-Kamara and agree with his narration of events. I shall now therefore proceed to deal with the grounds of appeal.

17. Despite these rather detailed grounds of appeal, the issues to be determined by this Court can be summarised as follows:

I. Whether the Trial Judge was right in arriving at her findings and making the Orders thereof in the light of the evidence adduced.

II. Was the Learned Judge correct in law to Order the Respondent to ensure full compliance of the Terms and conditions of the offer letter to SABCO Fishing Company dated the 12th October, 2016 including the clear demarcation of the land area to be granted and SABCO Fishing Company shall with immediate effect construct a concrete wall between its operating area and the Appellant's area and create a new and different exit and Entrance to its operating area, different from the existing entrance and gates to the Appellant.

18. In answer to the first question, I shall enquire whether there is any available evidence upon which the Trial Judge could have relied on the in concluding that the Lease Agreements dated 21st October, 2003 and the Supplemental Lease dated 9th December, 2013 respectively are void ab initio and thus not valid in law by the negligence of both the

Respondent and the Administrator General. The reason for this enquiry is that if this was the correct position of the law, then it would justify the Order made in favour of SABCO. Subject to the fact to the fact that the said SABCO was neither a party in the court below nor in this court.

19. In his synopsis, Osman I. Kanu Esq. Counsel for the Respondent argued that the Appellant had breached clause 2 (x), a fundamental clause of the Principal Lease agreement which provides for the Appellant not to sublet or part with possession or occupation of the premises demised or any part thereof without the written consent of the land lord, such consent should not be unreasonably withheld, and clause 2 (iii) which require the Appellant to at times during the said term of the lease to repair, uphold, maintain and keep in tenantable repairs the buildings and structures of the demised premises. He submitted that due to the breaches, the Respondent consistent with clause 4 (i) of the principal Lease, the Respondent re-entered the vacant part of the demised premises and instituted court proceedings to obtain possession of the un occupied part.

20. Mr. Kanu argued in the alternative that the lease Agreements were void ab initio for failure to comply with Section 4(1) of the Non-citizens (interest in Land) Act, 1966 Act No. 30 of 1966 which provides that' No non-citizen shall purchase or receive in exchange or as a gift any reserved leasehold in the Western Area without obtaining first a licence from the board.' On this point, Mr. Kanu relied on pages 6 and 7 of the Judgment of Wright J. in which Her Ladyship stated as follows :" The above transaction and the resulting instrument is non-compliant on three levels, first, the required licence not obtained by the Defendant from the Board, secondly, the term of 50 (fifty) years granted when it should be twenty-one (21) years; thirdly, the fact that the Registrar-General proceeded to register the resultant Lease Agreement without

ascertaining that all the requirements for non-citizen have been complied with."

21. In his synopsis on the issue of subletting, C.F. Margai Esq. Counsel for the Appellant referred to page 44 of the Records and page 3 of the Judgment wherein the Trial Judge said as follows:-

- Paragraph 4 "...In my mind, the Plaintiff/Respondent should have come to court to obtain the necessary Orders by proving the several breaches it was claiming

Page 245 of the Records and page 4 of the Ruling:

- Paragraph 1: However, the Plaintiff/Respondent in 2017 wrote another letter to the Defendant/Applicant, requesting a 1 year Action plan from the Defendant/Applicant. If the Plaintiff/Respondent claims to have the right of re-entry and forfeiture of the lease, why then was it requesting an action plan from the Defendant on its operation on the demised premises claiming diplomatic intervention
- Paragraph6: The Agreement in this instant case is called a cooperation contract "... nothing therein makes reference to sub-Leasing. The Plaintiff has not adduced any evidence whatsoever to back its assertion that the Defendant indeed subleased the demised premises to a 3rd party.

22. I have studied the arguments of both Counsel on this point and I agree with the Appellant that the Orders given by the the Trial Judge were at variance with the evidence. In particular, her Ladyship in her Judgment clearly stated that the relationship between the Appellant and Monza Fishing Company (the Company the Appellant purportedly sub-leased to) was one of the cooperation contract and not sub-leasing. In her own words, "the Plaintiff has not adduced any evidence whatsoever

to back its assertion that the Defendant indeed subleased the demised premises to a third party". Her Ladyship continued on paragraph 7, page 246 of the Records "... in this instant case, the Defendant was not in breach of the covenant not to sublet the premises to a third party."

23. It follows from the foregoing that the Trial Judge gave an improper Order for the Appellant to be granted a new Lease Agreement whilst the Lease and supplemental Lease Agreement dated 20th October, 2003 registered as No. 150/2003 at page 11 in volume 96 and 9th December, 2014 registered as No. 241/2014 at page 106 in volume 112 respectively of the Book of Leases kept in the office of the Registrar-General was still subsisting save the mistake in granting a term contrary to existing law: even this could be cured by rectification.

24. In any event, in the Sierra Leonean case of MACFOY –V- U.A.C OF SIERRA LEONE LIMITED (1964-66)ALL. SL3, the Court of Appeal held that a lessee who had covenanted not to part with possession of demised premises was not in breach of that covenant where he merely permitted another person to have use of the premises whilst he retained possession as a lessee. This was what happened in this case as in the words of the Trial Judge herself, the relationship between the Appellant and the purported sub-lessee was one of co-operation. I have not found any reason depart from that finding.

25. Having disposed of the complaint that the Appellant had sublet the premises without the consent of the Respondent, I shall now move on to the question of whether the Lease should be terminated on the ground of breach of the covenant to repairs etc . On this point the Trial Judge said that the length of time the Appellant has spent on the demised premises and the very significant quantum of investment the

Appellant has sunk into its operations on the demised premises is of paramount importance to this Court.

26. In her words, 'the structures on the premises were old and required substantial investments to rehabilitate and maintain."

27. Bairaman C.J defined the tenant's obligation to repair as being a duty to keep the premises wind and water tight but no duty to sustain and uphold the premises nor be responsible for natural wear and tear (JOHNSON –V- ZACHARIAH (1957-60)) ALR SL118. ()Referred to by Ade Renner Thomas in his book LAND TENURE IN SIERRA LEONE (PP. 96-97). The question is did the Respondent provide evidence to prove that the Appellant has not kept the premises in good order in accordance with the terms of the agreement? No such evidence was provided. These were premises used for fishing and related activities as such businesses have their own peculiarities as regards sanitation etc.

28. On this point, Beoku Betts J. in JABER –V- JABER (1950-56) ALR S.L. 97 had this to say:

" Material facts to be taken into consideration in determining whether there has been a breach of the covenant to repair are the locality, character of the premises ,"

29. The only logical conclusion on this point would be that no evidence has been provided to prove that the Appellant was in breach of the covenant to repair etc... Even if that had been the case, under the Conveyancy and Law of property Act 1881, the Respondent must have first served a notice on the Appellant specifying the particular breach complained of and requiring that it be remedied, if possible, ora reasonable compensation thereof. Section 14 of the Conveyancy and Law of Property Act, 1881 gives the Courts a wide discretion to grant relief

against forfeiture. This was the position in BASMA –V- NOURELDINE (1950-59) ALR SL234 where the Court exercised its discretion in favour of granting relief against forfeiture for breach of covenant to repair.

30. As regards the Order of the Trial Judge regarding full compliance of the letter of offer to SABCO, I hold that she ought not to have granted that Order. Under page 51 paragraph 1 of the Judgment, the Trial Judge after holding that the Appellant was not in breach of the covenant to sublet without written permission of the Respondent, as it did not sublet to a third party, went on to say "it thus follows therefore that, the Plaintiff/Respondent had no right whatsoever to lease a portion of the demised premises to a third party, even if the Defendant had breached the covenants of the lease agreement, the Plaintiff should have ensured that the Defendants were evicted from the demised premises before granting a lease of a portion of the demised premises to a third party; the Plaintiff/Respondent's conduct can be construed as wrongful interference with the Defendant/Applicant's quiet possession of the demised premises. " The Trial Judge notwithstanding this analysis granted an Order in favour of the third party SABCO on the ground that it was a bona fide or innocent purchaser for value and they have engaged in a not insignificant investment on the portion of the demised premises. I, with respect, hold a contrary view for reasons I shall proffer shortly.

31. In the case of RONALD LISK CAREW –V- ALIMAMY SAMUEL BANGURA CIV.APP 39/2009, (unreported), the Court of Appeal set aside the Order by the Trial Judge granting title to a non-party.

32. The Respondent in the instant case did not apply to the Court below to add SABCO as a party nor did it subsequently apply to amend his statement of claim. The Learned Trial Judge did not also sue moto

make either or all of such orders. These are the applicable conditions set out by Browne-Marke JSC in the case of RONALD LISK CAREW –V- ALIMAMY SAMUEL BANGURA(ubi supra) which I adopt herein.

33. Another justification given by Learned Trial Judge for giving an Order in favour of the 3rd party SABCO was that they were Bona fide or innocent purchaser for value. Accepting this justification would be stretching the doctrine to breaking point. This doctrine also known as bona fide purchaser for value, good faith purchaser, innocent purchaser, purchaser in good faith refers to a person who purchases for value without notice of any other party's claim against the property. It simply means one who purchases property for a valuable consideration that is an inducement for entering into a contract and without suspicion of being defrauded or deceived by the seller. He or she has no notice of any defects of the title. A bona fide purchaser pays in good faith, the full value for the property and, without any fraud goes into possession.

34. SABCO is in the fishing Industry as is the Appellant. Both are competitors and know of each other. SABCO ought to have known that the premises were leased to the Appellant and that no Court had ordered forfeiture of the leasehold interest. Before applying for the lease, SABCO would have visited the premises which visit could have revealed the occupation of the land by the Appellant. They have legal adviser(s) who should have informed them that due process had not been followed in offering a portion of the premises to them. SABCO is clearly not an innocent purchaser and therefore not entitled to benefit from that equitable remedy; for equity has an interest in and power over the purchaser's conscience.

35. The Respondent argued in the alternative that the Lease was null and void as it failed to comply with Section 4 of the Non-Citizens

(Interests in Land) Act, 1966 I note that this aspect of the Respondent's argument was not pleaded in the Writ of Summons.

36. Section 4 (1) provides that "no non-citizens shall purchase or receive in exchange or as a gift any reserved leaseholds in the Western Area without first obtaining a licence from the Board". In Section 2, Board means a Board consisting of the Ministers responsible for Trade and Industrial, Lands, Finance and the Attorney-General, of which the Minister of Lands shall be the Chairman. The Trial Judge held that the Appellant as a non-native by not complying with the said provision have rendered the Lease Agreements dated 21st October, 2003 and the supplemental Lease dated 9th December, 2014 respectively were void ab initio. I do not share that view. An agreement is void ab initio when it is considered invalid from the time it was written and/or signed (i.e. from the start of the contract). In the instant case the correct procedure to be followed in the grant of a lease was complied with – offer letter, payment of lease rent and preparation of the lease agreement. The difficultly arose when no application was made to Board for a licence. Even that did not make the agreement void as Section 5 of the said Act provides that "if satisfied that the failure to observe the law was due to genuine and excusable mistake or ignorance (whether of the law or fact), the Board may)"

a) Permit the parties to annul the transaction or modify it in such a manner as may he approved by the Board and grant such licence as may be necessary in relation thereto; or

b) Cause the Sheriff to sell property by public auction ..."

37. In effect, such an agreement could at worst be voidable in the event that the Board chooses option (B).

38. In any event, the events surrounding this transaction are akin to a dark comedy. Here the Appellant applied for a leasehold interest from the Minister of Lands, who gave it a letter of offer which he took to the

Attorney-General for a Lease Agreement to be prepared. After preparing and registering the said Lease, the said Minister of Lands and the Attorney- General purported to terminate the lease on the ground that the lessee had not applied for a licence from a Board of which the Minister of Lands is Chairman and the Attorney-General, a member. The Appellant is a Company having shareholders in Egypt and operating in Sierra Leone by virtue of a bilateral relationship between the two countries. The Respondent ought to have advised Appellant on the procedure to be followed in the grant of a lease to a non-citizen. This was not done and the Minister of Lands through the Law Officer's Department later purported to terminate the lease on the ground of non-conformity with the law. Given these facts, Section 5 (2) (a) should have applied. Allowing otherwise would be tantamount to sanctioning official gangsterism.

39. That the Administrator-General registered the lease and supplemental lease without reference to the Section 6 (1) (a) of Act would not make them invalid as regards the interest of the Appellant for the maxim Omnia praesumutur et solemter rite esse acta shall apply.

40. I have read Justice Fynn's draft opinion and also that of Justice Taylor-Kamara, I agree with their opinions on the other grounds of appeal.

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HON. MR. JUSTICE SENGU M. KOROMA JA