IN THE COURT OF APPEAL OF SIERRA LEONE

CIVIL APPEAL 51/2010

BETWEEN:

BALOGUN FRANCIS - APPELLANT

AND

AUGUSTA GIBSON (Lawful Attorney of MRS VICTORIA GIBSON) - RESPONDENT

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT
THE HON MRS JUSTICE A SHOWERS, JUSTICE OF THE SUPREME COURT (ACTING)
THE HONOURABLE MRS JUSTICE N MATTURI-JONES, JUSTICE OF THE SUPREME COURT (ACTING)

COUNSEL:
H M NGEVAO ESQ for the Appellant
C J PEACOCK ESQ for the Respondent

JUDGMENT DELIVERED THE 24th DAY OF JANUARY,2018

BROWNE-MARKE, JSC

THE APPEAL

1. This is an appeal brought by the Appellant, Balogun Francis, against a judgment of the High Court, the Hon Mrs Justice C L Taylor, presiding, dated 2nd Dece,ber,2010. The Notice and grounds of appeal are at pages 272 - 273 of the Record. They are as follows:
   i. The Learned Trial Judge failed to consider the entire facts before her before arriving at her judgment, and consequently erred in construing and applying the facts before her to the conclusions reached in the judgment.
   ii. The Learned Trial Judge misdirected herself in failing to consider whether:

(a) The questions of law set out in the notice of motion dated 15th September,2010 are suitable for determination without a full trial of the action pursuant to Order 17 Rule 1(1)(a) of the High Court Rules,2007.

(b) The said determination will finally determine the entire cause or matter or any claim or issue in the cause or matter, subject only to any possible appeal.

iii. The Learned Trial Judge erred in law and fact in coming to her conclusions that:

(a) The Lease dated the 10th day of December,2008 is invalid because the 2nd Lessor was not one of the legal owners of the said demised premises and lacked the power of attorney of Mrs Victoria Gibson, one of the legal owners, to act on her behalf.

(b) The 6 calendar months' notice to quit dated 29th June,2009 is invalid in law.

(c) The rent contained in the receipt dated 25th November,2009 issued by A K A Barber is not in conformity with the stipulated rent in the lease agreement dated 10th December,2008.

(d) The Appellant should give up possession of the premises lying and situate at 14 Adelaide Street, Freetown.

iv. The Judgment is against the weight of the evidence, having regard to the fact that the Appellant was never accorded the opportunity of proving his case on a balance of probabilities, especially having regard to the failure of the Learned Trail Judge to subpoena a key witness, A K A Barber esq to shed light on the issuance of the rent receipt dated 25th November,2009.

v. The Appellant has a good and triable defence to the action.

The relief sought by the Appellant is that the judgment of the Court below dated 2nd Decmber,2010 be set aside and that the Appellant be given an opportunity to prove his case in that Court; and that the Respondent bears the costs of the appeal as well of the action in the Court below.

2. The appeal was filed by G K Tholleyesq, but was argued in this Court by H M Ngevaoesq.Mr C J Peacock appeared for the Appellant in this Court and in the Court below.

FACTS OF THE CASE

3. By writ of summons issued on 14th June,2010, the Respondent, Mrs Victoria Gibson, through her Attorney, Ms Augusta Gibson instituted action against the Appellant herein for recovery of possession of property situate at and known as 14 Adelaide Street, Freetown; for a declaration that a purported lease dated 10th August, 2008 and expressed to be made between Mrs Rachel George and Miss Gloria Gibson of the one part, and the Appellant of the other, was void ab initio; arrears of rent; and for mesne profits. The property at Adelaide Street was conveyed to the Respondent, Mrs Rachel George, now deceased, and two others by way of deed dated 30th June,1987 and duly registered as no. 1058/87 at page 119 of Volume 403 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. No words of severance were used, and so the four beneficiaries held the property as joint tenants. At pages 29 - 32 of the Record, there is a copy of a document dated 10th August,2008,which could best be described as no more than an agreement for a lease, and said to have been made between Mrs Rachel George and Miss Gloria Gibson of the one part, and the Appellant of the other. It purports to demise the property at Adelaide Street to the Appellant for a term of 15 years certain, commencing 31st July,2008. It was not witnessed. Also, it was not registered. Ms Gloria Gibson is the daughter of the Respondent.
4. By letter dated 25th May,2009, - page 33, Mr Peacock, acting on behalf of the Respondent, wrote to the Appellant, notifying him of the joint ownership of the property, and that Ms Gloria Gibson was not one of the joint owners. Further, that the signature on the document purporting to be that of Mrs Rachel George, was not hers. There was no response to this letter. So, by letter dated 29th June,2009,Mr Peacock wrote again to the Appellant – page 34 - in which the Appellant was accused of fraud in the preparation of the purported agreement, and was given six months' notice, effective 1st July,2009, to vacate the property. The Appellant responded through his Solicitor, A E Manly-Spain esq by letter dated 16th July,2009 – page 35. Mr Manly-Spain contended that as the property was jointly owned, the Respondent could not rightfully claim sole ownership of the same as there were surviving issue of the original owners. He also rejected the allegation

of fraud. Mr Peacock replied by way of letter dated 20th July,2009 – page 36.

5. In his statement of defence filed with the leave of the Court on 28th June,2010, - page 60, the Appellant contended that he had a valid lease, and averred that he had performed all his obligations under the said lease. But the particular lease was not cited in that pleading. The reason for that omission only became clear later.The Respondent filed a Reply to that pleading – page 62. Therein, reference was made to another lease, dated 10th December, 2008 and purportedly registered; and to a claim supposedly made by the Appellant that he had paid rent to A K A Barber esq, in Mr Barber's capacity as Solicitor in charge of the property.No affidavit evidence was ever filed during the course of the hearing, confirming Mr Barber's position as Solicitor in charge of the property.

APPLICATION FOR JUDGMENT PURSUANT TO ORDER 17 HCR, 2007

6. By Notice of Motion filed on 16th September,2010 – pages 64 – 102, the Respondent still, through her Attorney, applied to the Court below for a determination of certain questions, and that if those questions were decided in favour of the Respondent, that she be given possession of the property. One contention raised by the Respondent is clear. By virtue of power of attorney dated 2nd June,2009, the Respondent gave power to both Mrs Rachel George, and her, the Respondent's daughter, Ms Gloria Gibson, to sign *"all legal documents on her behalf."* But 2nd June,2009 came long after the purported agreements respectively dated 10th August, 2008 and 10th December,2008. That Power of Attorney could not therefore validate anything which had happened or, had gone before. So, as of 10th December,2008, Ms Gloria Gibson had no legal or proper or adequate authority to act on behalf of her mother, the Respondent herein. And, according to the Respondent's Attorney, in her affidavit deposed and sworn to on 3rd Novembr,2010 – pages 104 -108, Rachel George, died on 22nd December,2008 – page 106. Susan George, another co-owner, had died on 9th January, 1998 page 107; and the fourth co-owner, Ina Smith, had died on 12th August, 2002 – page 108.
7. Thereafter, by letter dated 26th October,2010, - pages 109 -110, Mr Peacock wrote to Mr Barber, now deceased, seeking clarification of the issue

as to whether he had received rent allegedly paid to him by the Appellant on 25th November,2009 for a purported client who had died nearly a year earlier on 22nd December,2008, namely Mrs Rachel George. There is no recorded response from Mr Barber.

8. The Respondent's Application for Judgment on a question of law, came up for hearing before TAYLOR, J, and arguments were heard on 5th, 12th and 19th November,2010 respectively – pages 255 – 257. She gave her Ruling on 2nd December,2010 – page 258. She decided the main issues in favour of the Respondent.

ORDER 17 HIGH COURT RULES, 2007

9. The first issue we have been called upon to decide is whether the Learned Judge was right in disposing of the matter under Order 17 of the High Court Rules, 2007. That Order reads as follows:

Rule 1(1)

The Court may on the application of a party or, of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) The question is suitable for determination without a full trial of the action; and

(b) The determination will finally determine subject only to any possible appeal, the entire cause or matter or any claim or issue in the cause or matter.

(2) Upon the determination, the Court may dismiss the cause or matter or, make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either – (a) had an opportunity of being heard on the question; or (b) consented to an order or judgment on the determination.

10. Our Order 17 is in substantially the same terms as Order 14A of the English Supreme Court Rules, 1999. The notes to that Order are at pages 199 – 202 of the White Book, 1999. At page 200 note 14A/2/5, the Learned Editors state what the practice is: *"..An issue is 'disputed point of fact or law relied on by way of claim or defence. A question of construction is well capable of constituting an issue. If a question of construction will finally determine whether an important*

*issue is suitable for determination under Order 14A and where it is a dominant feature of the case, a Court ought to proceed to so determine the issue. Respondents are not entitled to be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document."*

SECTION 4 OF CAP 256 AS AMENDED AND S.3 OF THE REAL PROPERTY ACT,1845.

11. The question for determination before TAYLOR, J was the effectiveness of the two documents the Appellant was relying on. The construction to be put on both documents was in issue: the unregistered document dated 10TH August,2008; and that registered purportedly on 10th December,2008.
12. The first one is unenforceable in law because of Section 4 of the Registration of Instruments Act, Chapter 256 of the Laws of Sierra Leone, 1960. It was a disposition of an interest in land for a term of 15 years certain: It therefore ought to have been by deed, and ought to have been registered. It also contravenes the provisions of Section 3 of the Real Property Act, 1845, and Sections 1 and 2 of the Statute of Frauds, both of which are still part of our Laws. Section 3 of the 1845 Act requires that a Lease should be done by deed. This document lacked the essentials of a deed. It was also not witnessed.
13. The agreement purportedly dated 10thDecember,2008 was also invalid because of Section 4 of Cap 256. Further, it could clearly be seen that the month "*December*" was superimposed over something else which had been partially obliterated. In other words, the superimposition was done to make it appear that it was duly executed before Mrs Rachel George passed away on 22nd December,2008. But it failed to comply with the express provisions of Section 4 of Cap 256. It was only purportedly registered on 21st December,2009, more than a year after Mrs Rachel George died. No Order of the Court to authorize registration was obtained. Instruments executed in the Western Area cannot be accepted for registration more than 10 days after execution without an Order of Court. This is the effect of the amendment to Cap 256 made in 1964. There was no need for a full scale trial to determine whether this was so or not.

CAPACITY OF MS GLORIA GIBSON

14. The second issue is that Ms Gloria Gibson, though she is the daughter of the Respondent, was not duly authorized to execute any of the purported agreements on behalf of the Respondent. This was clearly an issue the Learned Judge could determine without a trial; and she did so.

DOCTRINE OF SURVIVORSHIP

15. The third issue is that the Respondent, as of the death of Mrs Rachel George on 22nd December,2008, held the property as sole owner through the operation of the principle of jus accrescendi, the doctrine of survivorship. The property was owned by four people, as of 1987. By 22nd December,2008 three of them were deceased. This left the Respondent as sole owner. This principle of law is explained in MEGARRY & WADE, 6th edition, Chapter 9 at the bottom of page 475 unto page 476: " *The right of survivorship: This is, above all others, the distinguishing feature of a joint tenancy. On the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship (jus accrescendi). This process continues until there is one survivor, who holds the land as sole owner. A joint tenancy cannot pass under the will or intestacy of a joint tenant. In each case the right of survivorship takes precedence."* The four unities of possession, interest, title and time were present in this case. No act of severance, recognizable in law had been done or taken by Mrs Rachel George before her demise. The unity of interest requires as explained in MEGARRY & WADE at page 478 that: *"...(iv)any legal act, e.g. a conveyance or lease of the land.....or the giving of a notice, requires the participation of all joint tenants. They cannot be effected by one joint tenant alone because he does not by himself have the whole estate."* Weekly or monthly tenancies are exempted under this principle as pointed out by the Learned Editors, but the term claimed by the Appellant in the instant case, was 15 years certain.

AUTHENTICITY OF THE RECEIPT EXHIBITED BY APPELLANT

16. The fourth issue is that even if we were to hold that one or the other of the agreements presented to the Court below was valid, the Learned Judge had considerable doubts about the authenticity of the receipt said to have been issued by Mr Barber to the the Appellant. The Appellant did not call Mr Barber as a witness: it was his duty to have done so, if he had so desired. It

was not for the Learned Judge to call him. Mr Barber was alive and in practice at the time. The receipt - page 53 - was purportedly issued by him on 25th November,2009 more than one year after the so-called lease was executed. It referred to a term, 1st August,2009 to 31st July,2010 not quoted in the said purported lease. The year "*2010*" showed clear signs of alteration. The amount quoted was Le492,500, and not Le1.5m as quoted in the purported lease. And, it may have appeared to the Learned Judge that the signature on the purported receipt may not have been that of Mr Barber. The three of us worked together in the Law Officers' Department for many years, and she was quite familiar, as I was, with Mr Barber's signature. All of these factors may have led her to conclude that atrial was a waste of time. We agree with her.

17. Learned Counsel on both sides filed written submissions, and we have given both of them due consideration. The appeal lacks merit. Though the Learned Judge's judgment was very brief and did not cover all of the points we have dealt with above, we are of the view that she came to the right and proper conclusion.
18. In the result, the Appellant's appeal is dismissed with Costs to the Respondent, such Costs to be taxed if not agreed.

THE HON MR JUSTICE N C BROWNE-MARKE, JSC

THE HON MRS JUSTICE A SHOWERS, JSC (ACTING)

THE HON MRS JUSTICE N MATTURI-JONES, JSC, ACTING