

CIV. APP. 48/2017

**IN THE COURT OF APPEAL OF SIERRA LEONE**

**BETWEEN:**

**FRANCES SMITH**

**APPELLANT**

**AND**

**ABRAHAM SMITH**

**RESPONDENT**

Coram:

Mr Justice R S Fynn, JA (Presiding)

Mr Justice M M Sesay, JA

Mr Justice E Taylor-Camara, JA

Representation:

*C Vandy Esq.* for the Appellant

*F K Gerber Esq.* for the Respondent

**JUDGMENT OF COURT, DELIVERED BY MR. JUSTICE E TAYLOR-CAMARA**

**THE 6<sup>TH</sup> DAY OF FEBRUARY 2020**

**Background**

1. By its decision dated 29th July 2015, the High Court, presided over by Mr Justice A Sesay, JA (as he then was), granted an order (the "Adoption Order") for the adoption of a child jointly by Mr and Mrs Smith, the Appellant and Respondent, respectively. By an Originating Motion, notice of which was dated 9<sup>th</sup> November 2016, Mr Smith applied to the High Court for an order to set aside the said Adoption Order on the ground that the order was obtained by fraud. By its decision dated 29 May 2017, the High Court (Mr Justice A Sesay, JA) ruled in favour of Mr Smith and set aside the Adoption Order. Mrs Smith is now appealing that decision to set aside the Adoption Order.

Routes for challenging order obtained by fraud

2. The Appellant, Mrs Smith, argues that the ground upon which Mr Smith, the Respondent/Applicant, applied to set aside the Adoption Order was that it was obtained by fraud. She says that in such case, if the decision to grant the Adoption Order was to be challenged, then such challenge ought to have been either by way of appeal to the Court of Appeal, or by instituting a fresh action in the High Court to set aside the order. She says it was not open to the Respondent to go back to the High Court to ask it to set aside its own final judgment.
3. In reply, Counsel for the Respondent, accepts that where fraud is alleged, it was open to the aggrieved party to either appeal to the Court of Appeal, or to seek to set aside the decision by instituting a fresh action in the High Court. He says that he opted for the latter when issuing the originating motion.
4. It is well established in the English courts that a judgment obtained by fraud can be challenged either by means of a fresh action to set aside the judgment, or by appealing and seeking to adduce thereat, fresh evidence through which either the fraud is admitted or demonstrating that the evidence before the appeal court is incontrovertible. In the recent English Court of Appeal case of *Terry v BCS Corporate Acceptances Ltd & Ors* (2018) EWCA Civ 2422, Hamblen LJ (as he then was) said the primary means of challenging a judgment obtained by fraud is by bringing a fresh action seeking the equitable relief of setting aside the judgment.
5. The English Common Law has been developed over many centuries and is applicable in many Commonwealth jurisdictions the world over, including Sierra Leone. Indeed much of this country's jurisprudence is based on the English Common Law. Neither party has drawn to this Court's attention, any provision in the Constitution or any other law in Sierra Leone, which prohibits an aggrieved party, and in this case, the Appellant, from seeking to adopt the English routes for redress. In light of the above we are of view that, in the absence of any national authority to the contrary, the principles set out in *Jonesco v Beard* (1930) AC 298 and confirmed in *Terry v BCS Corporate Acceptances Ltd*, may be applied in Sierra Leone, and accordingly, we hold that the said principles can and do

apply in this case. In our view, the Respondent was entitled to commence a fresh action to set aside the judgment on the ground of fraud.

Form of action where fraud is alleged

6. The above said however, the question then arises, how should such fresh action be commenced? More particularly, what form of action should such fresh action take? The Respondent commenced what he claims was a fresh action by originating motion. The Appellant says that where, as here, the allegations are based on fraud, the action ought to have been commenced by writ and not originating motion. She says that an originating motion should only be used where prescribed by law. Where fraud is alleged, then full pleadings should be used giving the other party an opportunity to counter the allegations made against them. This can only be done where an action is commenced by writ. Motions are heard on affidavit evidence and do not afford the defendant the best opportunity to present their case fully.
7. We agree. An originating motion, whilst clearly a legitimate originating process for commencing an action, is not the most appropriate process to use where allegations of fraud are involved.
8. In *Jonesco v Beard*, Lord Buckmaster said:

“It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by an action in which, as in any other action based on fraud, the particulars of fraud must be exactly given and the allegation established by the strict proof such a charge requires.”
9. Further, in order to succeed in setting aside the judgment of the High Court, not only must a fraud be properly particularised and proved, it must also have involved “conscious and deliberate dishonesty”, and the evidence must be credible and material.
10. The rationale for this was stated by Smith LJ in *Noble v Owens* (2010) EWCA Civ 224, where he said:

“...the defendant should not lose his favourable judgment without clear evidence of fraud. He should not lose it merely on account of a plausible allegation of fraud. The interest in finality of litigation should hold sway unless and until the judgment is shown to have been obtained by fraud.”

11. It is clear from the words of Lord Buckmaster in *Jonesco*, that where fraud is alleged, ‘the particulars of fraud must be exactly given and the allegation established by the strict proof such a charge requires.’ Such action must set out in detail the particulars of fraud, which particulars must involve allegations of conscious and deliberate dishonesty, and must be strictly proved by evidence which must be credible, material, and must be shown to have probably have had an important influence on the result of the case. The party accused of such fraud should not only be given the opportunity to plead and advance their defence to such allegations in pleadings, but also be given the opportunity to challenge the allegations by cross examination of any witnesses. This cannot properly be done via the route of an originating motion where evidence is by affidavit.
12. We are of the strong view that a fresh action alleging fraud can only be commenced by writ. We look no further for confirmation of this view than Ord.5 R2 High Court Rules (HCRs) which expressly requires that where a claim is based on an allegation of fraud, it must be commenced by writ. This was not done in this case, nor did the judge terminate the proceedings or convert the action commenced by originating motion into an action by writ. To that extent, the process was flawed.
13. This said however, Ord. 2 R1(3) HCR, prohibits the Court from wholly setting aside:

“any proceedings, or the writ or any originating process by which they were begun on the ground that the proceedings were required to have been begun by an originating process other than the one employed.”

As such, though the procedure was flawed, that of itself, is no ground for setting the judgment aside.

#### Fresh action or interlocutory application?

14. The more fundamental question it seems to me, is whether the Respondent’s application by way of originating motion dated 9 November 2016 (even assuming it was properly

commenced by writ), did in fact constitute a fresh action for the purposes of challenging the High Court's decision of 29 July 2015?

15. The Appellant says that the application to set aside the Adoption Order purported to be a fresh and separate action commenced by originating motion, but was in fact in the nature of an interlocutory application made in the original matter in which the Adoption Order was granted, the case number of which was Misc. App 321/15 S No. 40. She supports her claim that the application was an interlocutory application by pointing out that the application was made by originating motion in the matter which bears the same case number as the original matter in which the court made the Adoption Order i.e. Misc. App 321/15 S No. 40.
16. Counsel for the Appellant drew the Court's attention to the fact that the case number of the originating motion to set aside the Adoption Order was identical with that of the matter in which the Court originally granted the Adoption Order. Counsel argues that the originating motion was filed and issued in 2016, yet bears a case number identical with the matter commenced in 2015. This he says, demonstrates that the matter was not issued out of the Master's Office and is therefore irregular and renders the notice and application null and void. Whilst we do not agree with the reasoning behind this assertion, or the conclusion counsel draws therefrom, we do however think it raises a significant issue that calls to be addressed.
17. The originating motion was filed on 9 November 2016, yet it bears the case number of the earlier originating summons which was filed in 2015. The parties in both cases are the same. This would indicate that either the originating motion was erroneously given the wrong case number, or that the application was intended to be proceeded with as an interlocutory application in the 2015 Adoption Order proceedings. If the application had been intended as an originating process, then the matter ought to have had a separate and distinguishable case number to that of the original Adoption Order matter. That new case number would have included the year in which the action was commenced, i.e. 2016 and not the year 2015.
18. We do not think it was an error on the part of the Master's Office or indeed, the solicitor for the Respondent that the originating motion bears the same case number as the

earlier originating summons. The fact is that the Notice of Originating Motion was drawn up by the Respondent's solicitors, which solicitors were fully aware of the fact that their client had previously applied for and been granted the Adoption Order in the earlier application. The Respondent's solicitors were fully aware, or at least must be deemed to have been fully aware of the case number of the previous matter, given they referred to and exhibited copies of the court proceedings and order from those proceedings in the Affidavit in Support. Indeed it was the order of the Court in that earlier matter (the Adoption Order) that was the subject matter of their application. The solicitors nonetheless proceeded to apply the same title to their papers rather than filing a fresh application in the Master's Office calling for a new file number to be allocated to the new notice. It seems a reasonable conclusion to draw from the course of action adopted by the Respondent's solicitors that they were either indifferent in their preparation of their papers or, as we believe to be the case, they fully intended that their application to set aside the Adoption Order should be heard as part of the same proceedings and before the same Court and judge in which the Adoption Order was granted. It is also noticed that the matter did indeed come up for hearing before the same judge who made the Adoption Order.

19. During the course of the hearing to set aside the Adoption Order, the Appellant filed a motion dated 26 January 2017, pursuant to which she applied that the Respondent's application to set aside the Adoption Order, itself be set aside, one of the grounds being, as here, that the case number indicates that the application was an interlocutory application to set aside the Adoption Order and was not an originating process instituting a fresh action. In his Ruling of 13 January 2017, Sesay A, JA held that the originating motion was an originating process initiating a fresh action. The judge restated this view in his ruling of 22 May 2017.
20. Although the application was commenced by originating process, it is clear that it was treated as an interlocutory application. The fact the matter was assigned to the same judge that made the original Adoption Order, indicates that the matter was regarded and treated as an interlocutory application to set aside the order made by that judge. The question is, ought the judge to have heard the matter given that he made the original order?

Jurisdiction to set aside Court's final order

21. The Appellant says that the Court, in granting the Adoption Order, described it as being a 'final' order. She argues therefore, that the order having been a final order, the Court ought not to have entertained the application to set it aside as it had no jurisdiction to revisit the issue. She says that once the judgment had been delivered and perfected, the Court became *functus officio* by virtue of its having made the Adoption Order final. As such the Court became bereft of jurisdiction and could not revisit the matter. Accordingly, she argues, that the Court's order of 29 May 2017, is without legitimacy and should therefore be set aside and the Adoption Order be restored.
22. The judge does not appear to have asked himself whether, having made a final order, he could now revisit the matter and make an order which effectively set aside that final order? There is no issue here whether the Adoption Order was a final or interlocutory order. The judge was of the clear view that the order was a final order, and neither party has questioned whether that was the correct position, and no argument was heard on the issue. We think it safe to say that on the question whether the order was indeed final or not, the judge was correct. Mr and Mrs Smith had applied for the Adoption Order and it was granted them. It seems to me that, regardless which test is applied to determine whether the order was final or not, the resulting conclusion is that the order was final. The granting of the order effectively determined the rights of the parties. Those rights would have been finally determined whichever way the court had decided i.e. even if the court had refused the order (see *Salaman v Warne* (1891) 12 QB 734). The order, as made, finally disposed of the rights of the parties (see *Bozson v Altincham UDC* (1903) 1 KB 547). The order was therefore final. That being the case, the question arises, did the court have jurisdiction to revisit or review the decision to grant the Adoption Order?
23. It is pretty much settled law that a court does not have jurisdiction to revisit and/or review its own final judgment or order. In the English case of *Great Northern Railway v Mossop* (1855) 17 CB 130 at 132, Willes J said that
- 'The very object of instituting courts of justice is that litigation should be decided, and decided finally.'

24. Citing Willes, J as above, Buxton LJ, in *Enron (Thrace) Exploration and Product BV & Anor v Clapp & Ors* (2005) EWCA civ 1511 at paragraph 36 went on to say:

'In that spirit, once a judgment has been perfected and entered it is final in the sense that the court whose judgment it is cannot recall it, even if it had been obtained by fraud....Once perfected, the judgment can only be attacked by appeal; or by collateral action to set aside, the only ground for such action being fraud...'

25. In *Halsbury's Laws of England Vol 12A* (2015) at para. 1594 it is said that once judgment has been given on a claim, the claimant's cause of action merges in the judgment:

**"Merger of cause of action in judgment.** When judgment has been given in a claim, the cause of action of which it was given is merged in the judgment and its place is taken by the rights created by the judgment..."

26. After final judgment has been delivered and such judgment has been perfected and entered, the court cannot revisit or review the matter. This is clear from *Terry v BCS Corporate Acceptances Ltd & Ors* (2018) para. 54, where the Court, although it was dealing with the question whether an action could be struck out after judgement as opposed to setting aside the judgment, said that:

'Once a judgment has been perfected and entered there is no case before the first instance court, since it is *functus officio* and a party's rights are those of appeal.'

27. From the above it seems clear that the Court had no jurisdiction to re-open the issue after final judgment had been delivered. Whilst it was open to the Respondent to have challenged the Adoption Order on the ground of fraud, such challenge ought to have been either by way of appeal or by fresh action to set aside the Adoption Order, such action to be commenced by writ of summons rather than originating motion. The Respondent should have set out in detail, the particulars of fraud relied upon, and such action ought to have been conducted as a full trial on the issues, and not, as here, by way of affidavit evidence.



Right of party to put their case and be heard

28. The allegation is that the judge did not allow the Appellant an opportunity to put her case. Further, that the judge, having delivered his Ruling on 22 May, proceeded to deliver his judgment a week later without hearing the Appellant's counsel or witnesses. The records would indicate this was so. In our view, having, ruled against the Appellant on her Motion of 26 January 2017, the Court ought to have allowed her to defend the Respondent's claim of fraud by presenting her case and challenging the Respondents evidence. We are of the view that the judge's decision of 29 May 2017, ought only to have been made following a full trial of the issues and a determination as to whether there was in fact any fraud. The mere allegation of fraud is not enough. It must be strictly proved. This requires a full trial which an appeal would not allow for, unless it is established that the Appellant admitted to the fraud or that the evidence was incontrovertible. That was not done in this case and as a result the Appellant was denied an opportunity to present her case.

The Best Interests of the Juvenile

29. Best practice in cases involving a child require that the interest of the child must be given primary consideration in all the deliberations and in the outcome. Sadly this primacy has not revealed itself in the records settled before us nor has it been demonstrated in counsel's submissions; verbal and written made to us. We however should not lose sight of this all important guiding principle.
30. What then will be in the best interest of this Juvenile? We have indications before us that the child was, prior to the adoption, found living in very destitute circumstances. We have seen the reports made to the police and the social welfare department about the abandoned child.
31. We note that the person who had original care for the child is not related to the child by blood or any legal ties. We also note that this person and the child once lived in the Kroobay Area. Judicial notice can be taken of the living circumstances predominantly available in the Kroobay Area in the Western Area of Sierra Leone. Additional to this the report of Social Welfare does show that the child had been living in near squalor and has been exposed to a number of serious infections. It is established that medical treatment

was given to the child at the instance of the parties for ailments (measles, severe malaria and malnutrition) which are the common cause of child mortality in this locality.

32. It has not been lost on us that prior to Mr. Smith's change of heart, he together with the Respondent was eager to adopt and care for this particular child. There are documents before us which show clearly the various steps which the couple had taken to improve the welfare of the child including medical care, regular financial support and enrolling her in a reputable private school. These steps were all preparatory towards securing the adoption of the child and they also show in an oblique way the couple's intention to care for this child. But for the issues discussed above the couple would have remained so committed and jointly so. Mr. Smith it appears no longer has this passion but no evidence has been brought to us that would suggest that Mrs. Smith has lost her passion to care for the child.
33. Mr. Smith's seeming change of heart with respect to remaining the parent of this child would have required that we consider specifically whether it will be in the child's best interest to remain the adopted child of feuding parents, one of whom will prefer not to remain bound by the adoption order. We are mindful however, that the present appeal does not relate to the Adoption Order itself but rather to the later order which set it aside.
34. We are cognizant of the fact that as with birth parents, adoptive parents become bound to their children and cannot ordinarily simply decide offhand that they no longer want to be parents.
35. Regrettably we do not have sufficient evidence before us which conclusively shows the circumstances in which the child currently lives and under whose care. We have inferred though, from the interventions of the parties in the child's care, that they have pursuant to the challenged order, taken over the care and custody of the child.
36. We find that the life of the child became much improved since this couple became involved with the child. Similarly so, we consider the forgoing an indication that the life prospects of the child have also become significantly enhanced by the involvement of the couple in the child's life.

37. Considering the best interests of the child which are always paramount, the court will avoid any action which may tend to disrupt the present improvements in the child's life circumstances.
38. We have therefore taken particular notice of Sections 7 (1) and 9 of the Adoption Act of 1989 which when read con-jointly makes the granting of interim orders possible with respect to a child who has previously been the subject of an Adoption Order.

#### Irregularity in the forms

39. The Appellant argues that the Applicant's originating notice of motion was defective in that it failed to comply with many of the requirements for such application as set out in the High Court Rules 2007. The claim is that the Notice of Motion does not comply with the strict form and requirements of the High Court Rules 2007. In light of our conclusion below, we do not think it necessary that we spend much time on this ground of appeal. Suffice it to say that in our view, most of the complaints by the Appellant under this limb are technical in the sense they are claiming procedural irregularities in the form of the originating motion. For our part, we do not agree that non-compliance with the forms nullifies the action. This is made clear in Ord. 2 R1(1) of the HCR which provides that non-compliance with the requirements of the HCRs:

"whether in respect of time, place, manner, form or content or in any other respect,... shall be treated as an irregularity and shall not nullify the proceedings or any steps taken or any document, judgment or order made therein."

40. From the above it is clear that this Court would not set aside the lower Court's decision merely on the ground of irregularity.

#### Conclusion

41. In conclusion, it is our view that as the Respondent sought to challenge the Adoption Order on the ground of fraud, the only routes for relief open to him were to either appeal to the Court of Appeal and adduce thereat, fresh evidence of the fraud, or commence a fresh action by writ of summons in which the particulars of fraud were specifically particularised and the allegation of fraud proved by evidence to the required standard.

The Respondent opted to pursue the fresh action route before the same court that made the Adoption order using an inappropriate form of action, but over and above that, the Court lacked jurisdiction to revisit and set aside the Adoption Order as the said order was a final order of the same court and judge.

42. It may be arguable that by taking the action he has, the Respondent may no longer wish to be considered the lawful parent of the child. If so be the case, and he wishes to be relieved of such obligation which, prima facie, he voluntarily and jointly applied for, he is at liberty to apply for such relief as may be open to him. It seems to us however, that if the Respondent wishes to maintain his objection to the Adoption Order, premised solely on the purported fraud on the part of his wife, then the only options open to him are either to take a fresh action by writ to set the Adoption Order aside, or to seek leave to appeal the High Court's decision.
43. In light of the above, we come to the inevitable conclusion that the appeal ought to be allowed and the decision of the High Court dated 29 May 2017 should be set aside, and we so hold.

#### Orders

44. In light of our decision, we make the following orders:
- 1) That the decision of the High Court dated 29 May 2017, setting aside the order of the High Court dated 29 July 2015, is hereby set aside.
  - 2) That the Order of the High Court dated 29 July 2015, granting the Appellant and Respondent herein the right to adopt the child, the subject of the said order, be restored and remains valid and in effect unless and until it is set aside.
  - 3) The parties shall until and unless a competent court makes an order superseding this order, once every four months, file a report with the Ministry of Social Welfare disclosing the current educational, health and social circumstances of the juvenile.
  - 4) That the Appellant is entitled to recover her costs, such costs to be taxed if not agreed.

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**Justice E Taylor-Camara, JA**

I Agree. ....

**Justice R S Fynn, JA (Presiding)**

I agree. ....

**Justice M M Sesay, JA**