CIV.APP. 24/2015

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

HASSANI IBRAHIM & ZAINABU IBRAHIM
1 CANNON STREET
FREETOWN
AND
HIGH TECH INTL SCHOOL
REV. RICHARDS KOROMA
72 UPPER PHILIP STREET
WELLINGTON
FREETOWN

- APPELLANTS

- RESPONDENTS

REPRESENTATION:

YADA WILLIAMS & ASSOCIATES
7 WALPOLE STREET
FREETOWN
SOLICITORS FOR APPELLANTS.

C.F. EDWARDS ESQ.,
PRESTON SHAMBERS
98 FOURAH BAY ROAD
FREETOWN
SOLICITOR FOR THE RESPONDENTS.

JUDGMENT DELIVERED THIS 30th **DAY OF** July **2020.**

JUDGEMENT

INTRODUCTION AND BACKGROUND

The Plaintiffs/Appellants in this matter HASSANI IBRAHIM and ZAINAB IBRAHIM of No. 1 Canton Street, Freetown issued a Writ of Summons for possession before the High Court in Freetown. The suit for possession was brought by their solicitors firm called **YADA WILLIAMS & ASSOCIATES**. The suit was issued against the Defendants/Respondents High Tech International School and one Reverend Richard S. Koroma dated 25th day of November, 2014.

It was for the recovery of -

(1) Premises situate at Philip Street, Wellington Freetown.
(2) Mesne profits at the rate of Le 400,000.00 per month from the 1st of October, 2014 till delivery of possession
(3) Interest
(4) Costs

On the 28th day of November, 2014, the Defendants/Respondents through their solicitors C.F. Edwards Esq., entered an appearance for the Defendants/Respondents in that regard. On the 1st of December, 2014 solicitor C.F. Edwards filed in a defence on their behalf challenging the action. On the 9th day of November, 2014 Plaintiffs/Appellants solicitor's filed in a Judges Summons before the High Court against the Defendants/Respondents for summary judgment in accordance with order 16 rule 1 of the High Court Rules 2007. The summons was filed on the grounds that the Defendants/Respondents are their tenants and has no defence to the action. The said summons was supported by the Affidavit (joint) of the Plaintiffs/Appellants HASSANI IBRAHIM and ZAINAB IBRAHIM together with exhibits attached. The affidavit contained 17 paragraphs & exhibits.

Exhibit "A" - a copy of the writ of summons

Exhibit "B" - a copy of a conveyance as document of title of HASSANI and ZAINABU IBRAHIM being owners of the said property at Philip Street, Wellington Freetown presently occupied by the Defendants/Respondents dated 27th September, 2014.

Exhibit "C" - a copy of the Notice to quit served on the Defendants/Respondents dated 27th September, 2014.

Exhibit "D" - a copy of a tenancy agreement between the Plaintiffs/Appellants and Defendants/Respondents symbolizing their status as landlords of the said premises and land at Philip Street, Wellington. The tenancy was for one year certain which was registered at Registrar-General's office at Roxy Building, Freetown.

Exhibit "E" - A letter of reminder to the Defendants/Appellants of the expiration of their tenancy.

Exhibit "F" and "G" – A Memorandum and Notice of Appearance and Defence to the action.

Apparently the Plaintiffs/Appellant were positively canvassing that they are not only landlords to the Defendants/Respondents but owners of all the land and premises occupied by the Defendants/Appellants High Tech International School and Rev. Richard Koroma. Contrary to the Plaintiffs/Respondents case, C.F. Edwards sq., filed in an affidavit in opposition on behalf of Defendants/Respondents. The said affidavit was dated 9th day of January, 2015. This affidavit was sworn to by C.F. Edwards Esq., himself on instructions from his clients **HIGH TECH. INTERNATIONAL & REV. RICHARD KOROMA.** There were 9 paragraphs in the said affidavit with one exhibit marked CFF. This was a copy of a conveyance as property of one **MANESSAH BALOGUN DAVIES** (Deceased) dated 18th day of August, 1970.

According to the instructions from his clients he deposed that his clients were not put in occupation by HASSANI and ZAINABU IBRAHIM as they are asserting and had been in occupation of the said premises or property two years before signing the one year tenancy agreement with them. That even the said agreement was signed by them under duress. So in essence they were disputing their claim as landlords in respect of the said property.

On Monday the 12th of March, 2012 the application came before D.G. Thompson, J in the High Court for hearing. The matter was then heard together with all the arguments on both sides. On Wednesday 25th February, 2015, D.G. Thompson, J ruled on the application refusing the application for possession and ordered for the matter to proceed on trial. According to him the triable issues were raised by the Defence which deserves to be tested in a full scale trial with witnesses and others relevant documents.

The Plaintiff/Appellants being dissatisfied with the decision now appealed the judgment before this court which is the Court of Appeal consisting of three Justices of appeal.

GROUNDS OF APPEAL:

The grounds of appeal filed by the Plaintiffs/Appellants was dated the 6th day of May, 2015, they were listed as follows:-

1. That the Learned Judge was wrong in fact and in law to have ordered a full trial of the matter having concluded that "The Court agrees with Counsel for the Plaintiffs/Appellants that a tenant is not at liberty to dispute the title of the landlord and the authorities to substantiate his submission".

PARTICULARS:

That the only defence raised by the Respondents in para 1 – 3 of the Defence dated 1st December, 2014 and para. 3-5 of the affidavit sworn to on the 9th day of January, 2015, about the landlord of the Respondents was that the learned trial Judge was wrong in fact and in law to have ordered trial when there was no triable issue raised in the Defence of the Respondents dated 11th December, 2014 and para. 3-5 of the affidavit sworn to on the 9th day of January, 2015.

3. That the learned trial Judge was wrong in fact and in law when he concluded that - "It is possible that the two lands are separate and distinct or their might be an overlap on one land into another land. Even though the matter is not one for declaration of title but all the same it is imperative that the two lands are demarcated and distinguished properly before a proper, just and equitable decision could be given".

PARTICULARS:

That the Court having held that the matter before it, is not one dealing with a declaration of title and having further held that a tenant is not at liberty to dispute the title of the land lord and considering that the identity of the land is not an issue in dispute according to the pleadings of the parties, the learned Judge's conclusion cannot be said to be correct in the circumstances given.

4. That the decision of the trial judge is against the weight of evidence
5. That the judgment was given per incuriam.

Reliefs sought from the Court of appeal

i. That the ruling dated the 25th day of February, 2015 refusing summary judgment be set aside.
ii. That judgment be entered for the Appellants for

a. Possession of premises situate at Philip Street, Wellington Freetown
b. Mense profit at the rate of Le 400,000.00 per month from the 1st October, 2014 to delivery of possession.
c. Interests
d. Costs

iii. That the Appellants be awarded cost and the costs below.

The appeal was then heard by the court. Counsels on both sides made submissions to the court by their synopsis and escalated the arguments in their submissions by oral arguments in open court.

Submissions by solicitor and counsel for Plaintiffs/Appellants.

The submissions of solicitors for the Plaintiff/Appellants were related as follows:-

Firstly, that the learned trial judge cant approbate and reprobate in a sense that having said in his Judgment that he upholds the view of Plaintiff solicitor that a tenant is not at liberty to dispute the title of the landlord. He should not have gone ahead to refuse the application as the only defence raised by the solicitor and counsel for Defendants/Respondents in their defence as contend in para.1-3 and their supporting affidavit at para.3-5 was that they were not put in occupation by the Plaintiffs/Appellants and that they were put in occupation two years before the expiration of their tenancy agreement with Plaintiffs/Appellants. That they were put in occupation by a third party. They stated that they are the owners of the land and property at Philip Street, Wellington Freetown. The exhibited a survey plan in the name of **HASSANI IBRAHIM and ZUBAIRU IBRAHIM** at para. 3 of their supporting affidavit of the Judges summons. A copy of the said plan was marked as exhibit C.

Counsel for the Plaintiffs/Appellants also submitted that the Defendants/Respondents are their tenants for a year certain. That is they agreed to become tenants to them for one year only between the 1st day of October, 2013 and 30th day of September, 2014. The said agreement was exhibit D in the supporting affidavit of the judges summons. The learned trial judge agreed with the principle of law that a tenant cannot dispute the title of the land lord counsel relied on the dictum of Lord Denning in the case of **INDUSTRIAL PROPERTIES VS. AEI LTD (1977) 2 ALLER 293)**

Secondly, that the Defendants/Respondents did not produce anything tangible evidence that should have amounted to a triable issue. They then relied on the case of Bank of Bermuda Limited vs. Pentium (BVI) Limited and Land Cleve Limited Civil Appeal No.14 of 2003, the dictum of Saunders CJ (AG) at page 8 para.18 of the said judgment.

Finally, that for the judge to have based his decision on the grounds that it may have been possible that they were two separate pieces of land to be demarcated in a future proceeding was a palpably wrong as they were not before the court for a declaration of title. That the Court failed to connect the evidence before it to the subsequent decision made on that ground. They relied on the fact that no adverse claim was made by the purported landlords put toward by the Defendants/Respondents (Manny John and John Ola Davies). The cited or relied on the cases of **JOHN AYODE V. SPRING BANK PLC & ANOR (2013) LPELR 2073 C A PER HABEEB ADEWALE ABIRU (**JCA) and also the cases of SKYE BANK PLC VS. AKINPELU (2019) 9 MW;R ([41198) and BILOL (Nig) Ltd vs. Navcon (Nig) Ltd (2010) 16 N INLR (P + 1220) 619.

Submissions by Defendant/Appellants solicitor and Counsel

Firstly, that the Defendants/Respondents were put in occupation by a third party two years before they entered into a tenancy agreement with the Plaintiffs/Respondents. That persons who put his clients in possession have title in the form of a conveyance to the said land. The said conveyance was exhibited by the affidavit in opposition of the Defendant/Respondents. Marked "CFE"

Secondly, that the judge was right even though it was not a matter for declaration of title as there were two different claimants to the same piece of land.
Now for the judgment of this Court to be comprehensible I would have to amalgamate all the grounds of appeal into two according to the issues raised before this Court.

GROUND I:

The Learned Judge in his infinite wisdom by the evidence before him on affidavits and exhibits ordered the mater to proceed on the trial and refused the Application for possession. Now the evidence before the court was a writ of summons for possession detailing a conveyance of ownership to the property of the plaintiffs/Appellants and also

a tenancy agreement registered for one year between the Plaintiffs/Appellants and Defendants/Respondents. According to the affidavit of the Plaintiffs/Appellants the requested the Defendant/Respondents to vacate the said premises or property as it was for a year certain. The long and short of it is that the Defendant/Respondents are their lawful tenants.

The Defendants agreed with them on that point save that they were put in occupation by stranger or third party one Mammy John and Ola Davies. According to their affidavit in opposition to the Judges summons these two purported landlords did not depose to any affidavit to support their claim. The only affidavit before the court was that sworn to by the solicitor for the Defendants/Respondents himself C.F. Edwards Esq. So it is apparent that no adverse claim or competing title was raised by the Defendants/Appellants.

I will have to relate this to some part of the judgment or decision of D.G. Thompson, J. where he said "Even though the matter is not one for declaration of title but all the same it is imperative that the two lands are demarcated". Now the rethorical question to be asked is were these strangers parties to the proceedings ? the answer is no. This contravenes order 19 Rule 1 of the High Court Rules 2007. It states as follows –

1. Where in any action a defendant who has entered appearance, then subject to sub-rule 1 the defendant may issue a notice in an appropriate term containing statement of the nature of the claim. Also by rule 2 the Defendant applies for leave to the court to issue the notice for such a person to become part of the proceedings.

The matter before the court was not a dispute over the land and property at Philip Street Wellington, Freetown. I quite agree with the position that the court must not depart from the pleadings and evidence. It is like doing what someone is not asked to do. The case **JOHN AYO ADE V. SPRING BANK PLC & ANOR (2013) LPELR 20763** (CA) per **HABEEB ADEWALE OLUMUYIWA ARIBA** (JCA) has been rightly applied here. This takes us to the next question of whether there were triable issues for the matter to proceed on trial.

GROUND 2:

In any application for summary judgment a plaintiff comes before a court on the footing and pedestal that the Defendant has no defence to the action. That arises when a writ has been issued and the defendant has entered appearance and filed in a defence to the action and if necessary with a counter claim. So looking at the defence if it doesn't answer to the statement and particulars of claim, then the Plaintiff will be at liberty to come for a summary judgments that the defendant has no defence to the action or that their the Defence is a sham. But if the court looks at the defence exhibited by an affidavit in opposition together with other exhibits and discerns triable issues, then the court can order for the matter to proceed to trial or a part of the claim to proceed to trial.

Now looking at the application before the lower court was there a triable issue or were there triable issues although the Court held as such. I shall look at the ruling of the learned judge which said that solicitor for the Defendants/Respondents raised two issues in his affidavit in opposition sworn to on the 9th day of January, 2015.

Firstly, that the Defendants were put in possession of the premises two years earlier which was not controverted and that

Secondly, in paragraph 6 of the said affidavit whether both parties were referring to the same land.

Now apart from exhibit D the tenancy agreement between the Defendants/Respondents and the Plaintiff/Appellants was there any other tenancy document in the form of receipt, or written agreement relied upon by the Defendants or let us say that they were tenant at will to Manasseh Balogun Davies or the son George Ola Davies. These people did not swore to any single or joint affidavit to corroborate the opposing affidavit of C.F. Edwards to support their assertion. So can such amount to a triable issue to negative the claim of a Plaintiff/Appellant. The answer is no in a summary judgment proceedings. See the case of **PHILIPS VS. PHILIP AND ANOTHER** (292/2018) ZACGHC 40 (22ND May, 2018). Now the test for triable issues was **laid down this** case in the judgment of TONI AJ. Where he said "The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the Defendant is

bogus or is bad in law. What falls to be determined by the Court is whether, on the facts alleged by the Plaintiff in its particulars of claim it should grant a summary judgment, or whether in the Defendants opposing affidavit that it should refuse summary judgment".

Now in the instant case can one say that the Plaintiff's claim went unanswered. In my opinion the answer is yes. The Defendant/Respondent agreed that there is a tenancy agreement between them and the Plaintiffs/Respondents. The conveyance exhibited by the opposing affidavit was in the name of a third party who were not before the court. So they cannot deny the Plaintiff/ Respondent title as landlords, the law estops them from so doing.

The ruling of the Lower Court went on to state that because two separate conveyances were before the court produced by the Plaintiff's/Appellants and Defendants/Respondents, the may be two separate lands. The question here to be asked is whether any of the conveyances were in the names of the Defendants/Respondents. The answer is no. Was there any affidavit before the court sworn to by Manasseh Davies (deceased) or the son George Ola Davies. The answer were no. certainly there was no land dispute raised by the defence and the opposing affidavit to have warranted a full scale trial in that regard.

In my opinion based on the totality of the evidence before this court. It is my opinion that the Plaintiff/Appellant's claim for Recovery of Possession would not have been answered should the matter proceeded on trial. There was no defence raised in the defence of the Defendants/Respondents and the opposing affidavit did not raise any triable issue. I hereby uphold the appeal and accordingly set aside the ruling of Thompson, J (deceased) dated 25th day of February, 2015. Now having so opined I shall now state that the Plaintiffs/Appellants are entitled to possession and mense profits in respect of the land and premises situate lying and being at Philip Street, Wellington Freetown.

Mense Profits.

It is abundantly clear that the Defendant/Respondents have been in possession of the said premises after the expiration of their tenancy in October, 2014. It is trite law that they have to pay to the Plaintiffs/Appellants what is called in law mense profits. The Arbitration Resource Directory of arbitrators defines mense profits as the profit received from an estate by a tenant in wrongful possession. Mense profits is often calculated when there is a claim the accruals from a property illegitimately held by a person".

In the light of the foregoing I hereby make the following orders –

1. That the Plaintiffs/Appellants recover possession of premises situate at Philip Street, Wellington, Freetown.
2. Mense profit at the rate of Le 400,000/00 per month from 1st of October, 2014 till delivery of possession.
3. Defendants/Respondents to pay cost of Le 30,000,000/00 as cost of this appeal and the costs below.
4. That the Plaintiff/Appellants be at liberty to take out this writ of possession.

HON. MR. JUSTICE M.F. DEEN-TARAWALLY, JSC .....

HON. MR. JUSTICE A.S. SESAY, JSC .....

HON. MR. JUSTICE R.S FYNN, JA .....

CIV.APP 24/2015

IN THE COURT OF APPEAL OF SIERRA LEONE

Hassani Ibrahim
Zainab Ibrahim
vs.
High Technical School
Rev. Richards S. Koroma

Dissenting Opinion Delivered on 30th July 2020

Reginald Sydney Fynn JA

Introduction and Background

1. I have had the opportunity of reading the draft opinion of my brother the Hon Mr. Justice Deen-Tarawally and I adopt here his narration of the background to the matter as well as his recollection of the respective submissions of counsel. Whilst I also agree with his Lordship's evaluation of the factual matters and his appreciation of the legal issues raised by this appeal, it is however my opinion that a fundamental issue raised by the appeal which needs to be addressed is whether a Judge is always duty bound to enter final Judgment whenever he finds that a defence, is in his opinion flawed, a sham and without merit.
2. There is no doubt that O16 of our High Court Rules 2007 gives the Court power to enter final judgment where it has found that a defence is a sham. However this is not all, that there is to it. A Judge has other options available to him. A Judge can also grant conditional leave to defend where the defendant satisfies him that *"for some other reason"* there ought to be a trial.
3. The wording in O16 of our rules, replicates those in Order 14 R3 of the Supreme Court Practice 1999. It is suggested that by these words the scope for granting leave to defend and ordering a trial is extended wider than only when a defence is arguable or meritorious. This position is explored further under the rubric **"some other reason for trial"** (para 14/4/14 Supreme Court Practice 1999). Among the discussions proffered under this head, I find this guide particularly instructive for the present case, *"Wherever there are circumstances which require to be closely investigated there ought to be a trial and judgment should not be given under order 14 (our O16)"*

4. The LTJ found that the defence lacked merit and he based this finding on a point of law which is not difficult to discern *ie* the established principle that the tenant should not be allowed to challenge the landlord's title. However even this principle in it most fundamental form is not without exceptions and there is room for further investigation where for example the tenant seeks shelter under a paramount or superior title.
5. I am led therefore to opine, that in as much as a Judge is entitled to grant Judgment where he finds that a defence is a sham; he is however not compelled to always do so. It is also open to the Judge to grant conditional leave to defend, where he is satisfied that *"for some reason there ought"* to be a trial. It is for this reason that he is cautioned generally to use this power to grant Summary Judgment sparingly. Even where the defence put forward is "shadowy".
6. I must immediately clarify my present opinion with that which I gave recently in *Henry Kargbo v Hawa Turay (unreported)*. In *Henry Karbgo* the LTJ had found that the defence was a sham and had entered judgment for the applicant as she was entitled to do. The losing party had appealed to us seeking a reversal of the Judgment arguing that the Judge was wrong to have granted said judgment. The majority Justice Sengu Koroma JSC and I, (Justice Musu Kamara JA dissenting) had agreed with the Judge that the defence lacked merit and that the LTJ was entitled to and correct to have entered final judgment.
7. In that case the LTJ had assessed the defence and found it a sham and had exercised one of the options available to her. The majority on appeal assessed that defence found it to be a sham and proceeded to uphold the LTJ's right to enter final Judgment when the defence is a sham. There, the defence's failure to particularize the issues raised and in a timely manner had impacted my opinion significantly. In this appeal, I underscore the LTJ's entitlement to the option to order a trial, even when the defence is believed to be a sham, provided that the LTJ considers that there are *"circumstances which require to be closely investigated"*. And I must note that here the defence has not failed in particularizing the issues on which the defence intends to proceed.
8. In my opinion, if the LTJ was wrong below it must be with respect to his having failed to set out the reasons which led him to order a trial even though he had found the defence to be a sham. My reading of the facts have found the following circumstances such that will require further investigation in a full trial; *i) the possibility that the tenants may* have been paying rent to two landlords and of course ii) the competing conveyances which have been produced purportedly in respect of the same portion of land.
9. The LTJ did not set these things out as the circumstances which may have led him to order a trial. In my opinion however on rehearing, they do present such circumstances. Also the LTJ did not fix any terms on which he granted leave to defend. In my opinion if a Judge has found the defence to be a sham but that Judge believes that

"circumstances (exist nonetheless) which require to be closely investigated", and hence a need for a trial, the rules allow the Judge to grant such leave to defend but on terms. In other words what the court grants in such a circumstance is conditional leave to defend failing which the other party is entitled to judgment as prayed.

10. The LTJ may have failed to do these things, and to say with clarity that this was conditional leave to defend. However, in my opinion, these though necessary, are not failings that should result, in the judgment, being reversed. Considering that this court is empowered to do all such things that the court below could have done so as to lead to a just outcome (see R31), we are therefore well placed to fix terms upon which the defence may be proceeded with.
11. I will therefore refuse this appeal and make the following order on terms:

    The action shall proceed to trial below and the Defendant is granted leave to defend it on condition that:

    i. *All arrears of rent due and owing to the appellant for the premises shall be paid into court by the respondent/defendant no later than 20 days of this judgment.*

    ii. *Joinder of the purported rival claimant of the property as co-defendant within 20 days of this judgment*

12. I will make no orders as to costs.

Reginald Sydney Fynn JA.....