

IN THE COURT OF APPEAL OF SIERRA LEONE

CIV. APP. 16/2017

RAYMOND COKER

PIPELINE, JUBA HILLS

FREETOWN

APPELLANT

AND

ALPHA KAMARA (SUING BY HIS ATTORNEY, ABDUL O CONTEH)

13B PIPELINE, JUBA HILLS

FREETOWN.

RESPONDENT

REPRESENTATION:

ALEX M MUSA ESQ.

COUNSEL FOR THE APPELLANT

ROLAND A NYLANDER

COUNSEL FOR THE RESPONDENT

CORAM:

HON. MR. JUSTICE SENGU M KOROMA

JSC (PRESIDING)

HON. MRS. JUSTICE MUSU D. KAMARA

JA

HON. MR. JUSTICE JOHN-BOSCO ALLIEU

JA

DEAF

My Lord,
Forwarded Pl. for your
Comments.

09/6/2022

JUDGMENT DELIVERED BY HON. JUSTICE SENGU M.
KOROMA JSC ON THE JUNE, 2022

1. This is an appeal from the decision of the High Court dated the 1st day of July, 2014 on the following grounds:
 - 1) That the Learned Trial Judge erred in law by delivering Judgement against a Defendant who is permanently resident out of the Jurisdiction and who has not been served in accordance with the established rules of Order 11 of the High Court Rules, 2007.
 - 2) That the Learned Trial Judge erred in law by not upholding a fundamental principle of natural justice (i.e. giving the other party a fair hearing).
 - 3) That the Judgment is against the weight of evidence.
 - 4) That there shall be an application for leave to file further grounds.
2. The relief sought by the Appellant is that the decision of the High Court dated 1 July, 2014 and all subsequent proceedings be set aside and a proper trial be ordered.

BACKGROUND

3. The Plaintiff (the Respondent herein) filed a Writ of Summons witnessed on the 10th day of October, 2013 claiming the following:
 - 1) Declaration that the Plaintiff is the owner of all that property situate, lying and being at Off Pipeline Road, Juba hill Freetown in Western Area of the Republic of Sierra Leone
 - 2) Declaration that the Defendant has no title to any portion of the Plaintiff's Land
 - 3) Damages for Trespass and wrongfully entering upon the said land.
 - 4) Recovery of possession of the Plaintiff's land which is being claimed by the Defendant.
 - 5) An injunction to restrain the Defendant whether by himself or his Servant or Servants, Workmen, agents, privies and any person claiming right of entry upon the said land or otherwise from doing an act upon the said land or any part thereof inconsistent with the rights of the Plaintiff.

- 6) Delivering up and cancellation of any conflicting deeds, Instruments, plans and other documents and consequential rectification of all appropriate registers.
 - 7) Any further order or relief that the Honourable court may seem just.
 - 8) Costs
4. By order of the High Court dated 30th January, 2014, leave was granted to the Plaintiff, to serve the Defendant by publication of the Writ of Summons herein in two editions of a widely circulated newspaper. The said publication was made in the Standard Times newspaper.
 5. The Plaintiff filed a Notice of Motion dated 16th day of April, 2014 praying that Judgement be entered for all the relief claimed in the Writ of Summons on the ground that the Defendant had failed to enter appearance in accordance with the Rules.
 6. In the affidavit in support of the application sworn to on the 16th April, 2014 by Abdul Conteh (Attorney of the Plaintiff), it is deposed at paragraphs 7 and 8 that the Defendant was served by a Notice in two editions of the Standard Times Newspaper but failed to enter an appearance.
 7. The Application was granted by the Hon. Justice A. Dworzark J by an Order dated 1st July, 2014.
 8. By order of Dworzark J dated the 10th July, 2014, the Plaintiff was granted leave to issue a Writ of Possession and a Writ of Assistance.
 9. The Defendant entered appearance on the 6th January, 2015.
 10. The Defendant filed a Notice of motion dated the 23rd January, 2015 seeking the following relief:
 - 1) That the Judgement in the matter herein dated 1st July, 2014 before the Hon Justice A. Dworzark J and proceedings leading to this Judgment BE SET ASIDE on the grounds that it infringes Order 11 Rule 1 sub-Rule 1(g) of the High court Rules, 2007.
 - 2) That the Judgement in the matter herein dated 1st July, 2014 before the Hon. Justice A. Dworzark J BE SET ASIDE and the entire proceedings be declared a nullity on the ground that it infringes the natural justice principle of Audi alteram partem” (give the other party a fair hearing).
 - 3) A restitution of the Defendants’ right to the property before the Judgement was obtained.

- 4) Any Order or further Orders that may seem just to this Honourable Court.
- 5) Costs.
11. By order of the Hon. 'Mrs. Musu D. Kamara J (as she then was) dated Tuesday 22nd December, 2015, the Application dated the 23rd day of January, 2015 was refused on the ground that the reliefs prayed for would Amount to an appeal and since she had concurrent jurisdiction with Dworzark J, the matter could best be determined by the Court of Appeal. She further held that the situation would have been totally different if the Applicant had asked for the Judgement to BE SET ASIDE on the grounds that the Defendant intended to proceed with the matter so that it would be determined on its merits.
12. On the 14th April, 2016 following an Application filed by the Defendant dated 30th March, 2016, Hon Mrs. Justice Musu D. Kamara J (as she then was) granted the Defendant an enlargement of time within which to appeal and leave to Appeal.

THE APPEAL

13. Both Counsel, Alex M. Musa Esq for the Appellants and Roland A. Nylander Esq. for the Respondent filed and relied on written synopses.

THE APPELLANT

14. Mr. Musa argues that the default Judgement dated 1st July, 2014 and all process as leading to that Judgment here flawed for the following reasons:
 - i. the procedural steps prescribed in the High Court Rules, Order 11, Rule I Sub Rule1 (9) have not been complied with in that the Plaintiff and the Attorney were aware that the Defendant did not live in the "pan body" structure at Pipeline Juba nor does he live in Sierra Leone.
 - ii. that the Plaintiff's Solicitor was aware that Alex M. Musa Esq. was the Solicitor for the Defendant since he acted for the caretakers of the Defendant during an ejectment action in the Magistrates Court.
15. Mr. Musa argues further that the Plaintiff's claim of right to the property is obviously questionable in the light paragraph 3 of his particulars of claim. Little wonder then that the principal order he prays for is vague. He submits that this matter should not have even got a full blown trial in the

first place; it should have been disposed of on a point of law.

THE RESPONDENT

16. In his synopsis, Roland Nylander Esq. for the Respondent submits that Order 11 of the High Court, 2027 is not applicable as the action was not instituted on the basis that the Appellant was ordinarily resident out of the jurisdiction but rather the normal way of instituting proceedings was followed.
17. When personal service on the Appellant was impracticable, an application for substituted service was made pursuant to Order 10 Rule 5 of the High Court Rules 2007.
18. He argues that the fact that the application for substituted service was granted by the Court is sufficient proof that proceedings before the Court were not brought or instituted pursuant to Order 11 of the High Court Rules 2007.
19. On Ground 11, Mr. Nylander submits that the fact that substituted service was ordered pursuant to the High Court Rules 2007 means that the Appellant was given an opportunity to be heard and participate in the trial. He argues that the rules provide for Judgement in default of appearance based on substituted service and so applying the rules does not amount to a breach of fundamental principles of natural justice.
20. Mr. Nylander submits that the application to set aside the Judgement was based on the grounds of appeal filed and not prayed for on the merit of the proposed defence or the strength of the case. In other words, the Appellant has not provided good reasons for the Court to set aside a regular Judgement; a regular Judgement could only be set aside on establish principles.
21. The crux of the Appeal it appears to me is that the Judgement was irregular. In the words of Mr. A.M. Musa for the Appellant, "I submit that the Judgment in default was obtained mala fide".
21. Mr. Nylander for the Respondent finally submits that the Judgment was regularly obtained.

22. I shall now proceed to determine the grounds of appeal herein.

GROUND 1

23. The Appellant argues that the Learned Trial Judge erred in law by delivering Judgement against a defendant who is permanently resident out of the jurisdiction and who has not been served in accordance with Order 11 of the High Court Rules, 2007.

ORDER 11, Rule 1 Sub-rule 1 (g) provides as follows:

Service out of the Jurisdiction of a Writ of Summons or Notice of a Writ of summons may be effected with leave of the Court in cases where:

(g) the whole of the subject matter of the action is land situate in Sierra Leone (with or without rents or profits) or the perpetuation of testimony relating to the land so situate.

24. Counsel for the Respondent argues that Order 11 is inapplicable in this action as it was not instituted on the basis that the Appellant was ordinarily resident out of the jurisdiction.

25. The power of the court to exercise jurisdiction beyond its territorial boundaries has been variously described as “long arm jurisdiction”, “assumed jurisdiction” or even “exorbitant jurisdiction”. However, the power is only activated using the instrumentality of grant of leave for the issuance and service of such originating process outside its jurisdiction. While applying for leave, the Applicant must convince the Court that there exists a special reason for it to exercise its long arm to reach a Defendant outside its jurisdiction.

26. In the instant case, there appears to be confusion between an application for leave process outside Sierra Leone with an application for substituted service within Sierra Leone. In the Nigerian case of *KIDA-V-OGUNMOLA* (2006) ALL FWLR (PP. 327) 402, the appellant commenced an action for specific performance against five Defendants. The Court Bailiff however was not able to serve the Respondent, who was resident outside the jurisdiction of the Court. It was known by the Appellant that the 2nd Respondent was out of the jurisdiction. The

Appellant then applied for leave to serve the originating process on the 2nd Respondent out of the jurisdiction. Curiously, the Appellant also applied for leave to serve the originating process on the 2nd, 3rd and 4th Respondents by substituted means by pasting same at their last known address and the court granted same. When the Respondent failed to file a defence, the High Court entered a default Judgement against him. When the Appellant initiated enforcement proceedings against the Respondent, the Respondent brought an application to set aside the Judgment on the grounds that leave was not obtained to issue the originating process out of the jurisdiction. The High Court refused the application but upon appeal to the Court of Appeal, the Appellant Court overturned the Trial Court's decision. The Appellant ultimately appealed to the Supreme Court which upheld the decision of the Court of Appeal.

27. The Supreme Court reasoned that the Respondent was outside of the jurisdiction at the material time and could not be served by substituted means, and that substituted service can only be employed in situations where the Defendant is within the Jurisdiction but cannot be served personally with the processes within the jurisdiction. For example, when the Defendant cannot be traced or when it is known that he is evading service. Also, where at the time of issuance of the Writ, personal service could not in law be effected on the Defendant, who is outside of the jurisdiction of the Court, substituted service should not be ordered.
28. If the Defendant is outside the jurisdiction of the Court at the time of the Issuance of the Writ and consequently could not have been personally served in law, not being amenable to that Writ, an order for substituted service cannot be made. **WILDING-V-BEAN (1981) 2 QB 100.**
29. The above case emphasises that writ issued in the ordinary form cannot be served by substituted means on a defendant who is outside of the jurisdiction of the court, except the leave of the court was sought and obtained in accordance with the relevant rules of court.
30. The principles of service out of the jurisdiction and substituted service are clear and distinct. In the instant case, the Applicant is arguing that based

on a summary ejectment matter in which the Appellants' caretakers were the Defendants with both himself and Mr. Nylander as Counsel, the title of the Appellant was in evidence clearly showing that the Defendant was not ordinarily resident in Sierra Leone.

31. The respondent on the other hand argues that in the Magistrate Court matter referred to by Counsel for the Appellant, the Respondent herein was not a party as the matter was against one Madam Kadie and was discontinued for personal reasons.

32. From what I have read so far, the Respondent has not denied that he was shown a document indicating who the Appellant was. It is clear that the Respondent knew who the Appellant was, otherwise how could he have known his name? The correct position should have been made for leave to serve the Writ of Summons out of the jurisdiction. If the Appellant could not be found in the Jurisdiction he was supposed to be in, an application for substituted service would be made using the appropriate Rules of Court. As I stated earlier, substituted service could only be made when the Defendant is within the Jurisdiction but could not be traced or is suspected to be evading service.

33. It is my conclusion that the Order of the High Court dated the 1st day of July, 2014 is a void Order. It results from a "fundamental defect" in proceedings. This is because there was failure in the service of the process as service of the proceedings never came to the notice of the Defendant (now Appellant) as he was aboard at the time.

34. In the circumstance, the Judgment dated 1st day of July, 2014 was irregularly obtained and thus giving the right to the Appellant to set it aside **"ex debito justitiae"**.

35. It is therefore ordered as follows: -

1. That Judgment of the High Court dated the 1st July, 2014 is hereby set aside and all subsequent proceedings stayed.
2. That the Appellant shall enter appearance and file a defence within 10 days of the date of this Order.

3. That the Respondent shall file a reply and close all pleadings within 3 days after the expiration of the period limited for filing the defence.

4. Costs.

HON. MR. JUSTICE SENGU M. KOROMA – JSC

HON. MRS JUSTICE MUSU D KAMARA- JA-----

HON. MR. JUSTICE JOHN BOSCO-ALLIEU –JA -----