CIV. APP 69/2017

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

UNISA BANGURA **APPELLANT**

AND

ABU BAKARR KAMARA **RESPONDENT**

Coram:

Justice S R Fynn, JA

Justice M M Sesay, JA

Justice E Taylor-Camara, JA

Representation:

E. T. Koroma Esq for the Appellant

J K Lansana Esq for the Respondent

JUDGMENT OF JUSTICE E TAYLOR-CAMARA, JA

DELIVERED THE 26TH DAY OF JANUARY 2023

1. The Appellant claims to be the owner of 0.0836 acre of land lying and situate at Devil Hole along the New Freetown – Waterloo Road Freetown in the Western area of the Republic of Sierra Leone as the same as delineated on survey plan numbered LS4430/14 signed by the Director of Surveys and Lands and dated 22 August 2014, which plan is attached to the Appellant's conveyance dated 22 October 2015, which conveyance is registered as number 1990 In Volume 756 of the Book of Conveyances kept in the Office of the Administrator and Registrar-General in Freetown.

2. The Respondent claims to be the owner of 2.7284 acres of land lying and situate at Devil Hole along the New Freetown – Waterloo Rd, Freetown in the Western Area of the Republic of Sierra Leone as the same as delineated on survey plan numbered LS 4900/14 signed by the Director of surveys and Lands and dated 11 February 2015, which plan is attached to the Respondent's conveyance dated 27 February 2015 which conveyance is registered as number 357/2015 at Page 75 In Volume 745 of the Book of Conveyances kept in the Office of the Administrator and Registrar-General in Freetown.

3. By an Ejectment Summons numbered 46/14 dated 19 July 2014, the Respondent commenced Summary Ejectment proceedings in the Magistrates Court against 20 persons, one of which was the Appellant's wife.

4. By writ of summons dated 25 May 2016, the Appellant commenced proceedings in the High Court against the Respondent claiming a declaration of title to the land to which his conveyance relates. The Appellant also claimed damages for trespass and an injunction against the Respondent from trespassing upon the Appellant's land.

5. On 15 July 2016, the Magistrates Court (Magistrate Ganda, as he then was), granted the Respondent immediate possession of the land described in his conveyance.

6. By Notice of Motion dated 18 July 2016, the Appellant applied to the High Court for a stay of execution of Magistrate Ganda's order for possession.

7. By order dated 28 July 2016, the High Court (Samba J, as she then was) granted the Appellant the said stay and issued an injunction against the Respondent from entering on, moving, selling or leasing the land claimed by the Respondent.

8. By notice of motion dated 26 May 2017, the Respondent applied for the order of Samba J granting a stay of execution of Magistrate Ganda's order to be 'deleted or dispensed' with pending the hearing and determination of the substantive action.

9. By order dated 20 July 2017, the High Court (Kamanda, J, as he then was) ruled that the High Court had jurisdiction to correct the order of 28 July 2015 and accordingly restricted the extent of the interlocutory injunction granted by Samba J to the land claimed by the Appellant in his conveyance and nothing more, and ordered that the stay of execution of the judgment of Magistrate Ganda of 15 July 2015, should apply only to the land claimed by the Appellant. The court also ordered a speedy trial of the action. It is against these orders of 20 July 2017, that the Plaintiff/Appellant now appeals.

10. Counsel for the Appellant did not address the court orally at the appeal hearing and relied on his Synopsis for his arguments. It appears to me that the essence of the Appellant's appeal is as follows:

    a) That the High Court order of 28 July 2016 was a final and binding decision and that it was covered by the principle of res judicata.

b) As such, it was not open to a judge of the High Court, being of coequal jurisdiction, to amend the order. Any application for amendment of the order should be applied for by way of appeal to the Court of Appeal, rather than seek to have the order amended by the High Court under Order 23 Rule 10 of the High Court Rules 2007 (hereafter "O23 R10").

c) Even if it were open to the High Court to revisit the decision, it could not do so pursuant O23 R10. That rule only permits "clerical mistakes" and "accidental slips or admissions" to be corrected. The amendment ordered did not fall into either of these categories.

I will address the issues accordingly.

Res judicata

11. The Appellant argues that the decision of Samba J to issue the injunction against the disposition of the land by the Respondent, was and is binding on the parties and that the attempt by the Respondent to have the order amended amounted to a breach of the doctrine of res judicata which provides that a decision on the rights of the parties cannot be re-litigated on the same cause or issues in fresh proceedings.

12. The Appellant argues that the application for the injunction was heard *inter partes* with full arguments by both sides. The ruling of Samba J on 28 July 2016, determined the issues between them. The Appellant therefore argues that the application for amendment amounted to a relitigation of the issues which the court has already made a determination upon.

13. In reply the Respondent argues that the order granting the injunction did not deal with the issues or cause of action raised in the Writ of Summons between the Appellant and the Respondent. As such, the doctrine of res judicata does not apply.

14. It seems to me that the question whether the decision of the High Court to grant the injunction is binding upon the parties or whether it can be revisited by the court without appeal, depends to a great extent on whether the order is considered interlocutory or final. It is well established that the doctrine of res judicata does not apply to interlocutory decisions or orders. In *Bozson v Altincham* [1903] 1 KB 547 it was said that a final decision is one that finally disposes of the rights of the parties. In *White v Brunton* [1984] 2 All ER 606, the English Court of Appeal held that the test formulated by Lord Esher MR in *Salaman v Warne* [1891] 12 QB 734, to wit, that

"a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation."

15. Although many other Commonwealth jurisdictions e.g. Nigeria, Canada, Australia and Malaysia, opt for the former test, this latter test, which is the test adopted in the English courts, is also the test that was preferred by this Court in the case of *Francis Foray Koroma v Kusan Sesay & Ors* [2019] E P Civ. App. 52/2018.

16. It is well established that a final order "is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co- jurisdiction although it may be subject to appeal to a court of higher jurisdiction." (per Lord Diplock in *DSV Silo-und Verwaltungsgesellschaft mbH v Senna (Owners), the Senna (No. 2)* (1985) 1 WL R490 HL).

17. Whichever test is applied; it seems to me that the conclusion to be drawn in the appeal before us is that the order of Samba J was an interlocutory order in that it did not finally dispose of the rights of the parties nor would such rights be finally determined regardless whether the interim injunction were granted or refused.

18. It is also well established that both an order staying proceedings or execution, and an order granting an interlocutory injunction are interlocutory orders (see O.59 R1A (6) (m) and (s) of the English Supreme Court Practice 1999, which is applicable in Sierra Leone). It seems clear to me also, that any application to amend or any order amending or varying clerical mistakes or errors in the wording of such an interlocutory order must itself be interlocutory. The decision of Kamanda J was therefore interlocutory.

19. This was a point not lost on the Appellant as he applied for leave to appeal the decision of Justice Kamanda. Leave to appeal is only necessary for interlocutory appeals i.e. for appeals against interlocutory orders. No leave is required where it is intended to appeal against a final order. Appeal in such case is as of right. It was not therefore necessary for the Appellant to seek leave to appeal against Kamanda J's order. That the Appellant did so, is indicative of his belief that the order was interlocutory.

20. I have considered the arguments by both counsel in this issue. In my view, there is no merit in the Appellant's contention. It is clear that the application before Samba J was for an 'interlocutory' injunction, pending the hearing and determination of the issues between the parties. The order given was an interlocutory order and not a final order.

21. The order did not in any way finally determine any of the issues raised in the substantive matter, to wit, the ownership and entitlement to the respective plots of land. Indeed, Kamanda J gave directions and ordered that there should be a speedy trial of the action to determine those issues.

22. The fact remains that the dispute between the parties concerned rival claims to ownership of land at Devil Hole, and the granting or refusal of the interim injunction would not and did not finally determine the question who owned the property.

23. The decision of Kamanda J, which is the decision being appealed here, was also an interlocutory decision and not a final decision. It did not determine the rights between the parties. In such circumstances I am satisfied that the doctrine of res judicata does not apply.

Order 23 Rule 10

24. The Appellant claims that the application for amendment of the order of Samba J ought not to have been entertained as the amendment sought does not fall within the spirit of O23 R10. The Appellant claims that Kamanda, J, misdirected himself and erred in interpreting and applying O23 R10.

25. The Appellant claims further that Kamanda J, then sitting as a High Court judge, and thus a judge of co-equal jurisdiction with Samba J, did not have jurisdiction to amend Samba J's order.

26. Let me say at the outset, that I do not accept the Appellant's submission that a court of co-equal jurisdiction cannot revisit and amend the decision of an earlier court of the same jurisdiction under O23 R10. I think this a misguided point of view. Clearly any application to amend a judgment or order of a judge should, where the judge is available and in the same jurisdiction, be made to that judge, especially where, and as, the contention is that the order, as made, does not reflect the judge's intention. But, as was confirmed in no uncertain terms in the English case of *R. v. Cripps ex parte Muldoon* [1984] 1 QB 68, a judge of co-equal jurisdiction clearly has power under the rule to revisit and amend the decision of an earlier court. In that case Robert Goff LJ said (at 80B-E):

> "[I]ndeed, it appears to us, if in any particular case the trial judge was not available (for example, because he had died) after the drawing up of the order, another judge of the High Court could exercise the power of the High Court under the slip rule to correct an accidental error."

I do not think more need be said on this issue.

27. O23 R10 (known as the slip rule) provides as follows:

> "Clerical mistakes in judgments or orders, or errors arising in the judgement or orders from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal."

28. In the English case of *Mutual Shipping Corporation v Bayshore Shipping Co.* [1985] 1 Lloyd's LR 189, Sir John Donaldson M.R. explaining the application of RSC 0.20.r.11, the English equivalent of our O23 R10, said at page 193:

> "The High Court Slip Rule (RSC 0.20.r.11) which is similarly worded, was considered only recently by this Court in *R v. Cripps ex parte Muldoon* [1984] 1 QB 686. We there pointed out the width of the power, but also drew attention to the fact that it does not enable the Court to have second thoughts (p. 697).
>
> It is the distinction between having second thoughts or intentions and correcting an award or judgment to give true effect to first thoughts or intentions, which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected ... under o. 20, r. 11..... The remedy is to appeal, if a right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is not an accidental slip. It is an intended decision which the arbitrator or Judge later accepts as having been erroneous."

29. The Appellant's Notice of Motion was very clear that the application for the injunction related specifically to the piece and parcel of land claimed by the Appellant. The judge granted the orders and the drawn up order reflected the orders as set out and prayed for in the Notice of Motion. The question then, is whether those orders reflected Samba J's intention. Did she intend that the stay should be restricted to the area of land claimed by the Appellant, as found by Kamanda J, or not?

30. The application before Kamanda, J, as appears from the Notice of Motion dated 26th of May 2017, was for the following relief:

> "1. That leave be granted the Defendant/applicant herein for an order to delete and or dispense with paragraph 2 of an order granted by this Honourable Court dated 28th day of

July, 2016: "for a stay of Execution of His Worship Magistrate Ganda at the Waterloo Magistrates Court this between: -

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Abu Bakarr Kamara v Alpha Kargbo and Others

Pending the hearing and determination of this matter on its merits as it involves the same Res (subject matter) on the grounds that the said order was made erroneously or per incurium and therefore needs to be varied or corrected by this Honourable Court pursuant to this application.

31. Paragraph 2 of the order of Samba J read:

"2. That a stay of execution of the Judgement dated 15th July 2016 delivered by his Worshipful [*sic*] Ganda at the Waterloo Magistrates Court between Abu Bakar Kamara v Abdul Kargbo and Others is granted pending the hearing and determination of this matter on its merits as it involves the same Res (subject matter).

32. It is clear from his Notice of Motion, his Affidavit in Support, and the arguments advanced by his counsel before Kamanda J, that the gravamen of the Respondent/Applicant's complaint was that the effect of Samba J's order, as drafted, was to prevent him from executing the order for possession granted by Magistrate Ganda. He wanted to deal with the land, but the stay, as granted, hindered his efforts. He argued that Samba J's order should be deleted and disposed with as the judge had erred in granting the stay of execution of the order of Magistrate Ganda to the Appellant. He stated in the Notice that *"the said order was made erroneously or per inquirium [sic] ..."* And at paragraph 11 of his Affidavit in Support, he said that he considered the said order to have been *"erroneous and mistaken"* and he therefore sought rectification so that the mistake would be corrected.

33. In reply, Counsel for the Appellant/Plaintiff argued that the Respondent's application was misplaced. The application before the court was for the order for stay to be "*deleted and dispensed with.*" He said that the application was being made pursuant to O23 R10, which order makes provision for "clerical slips or omissions" to be corrected. He argued that an application under that rule would not allow for an order to be deleted or dispensed with, nor could an application for deletion or dispensation of an order be made under O23 R10. He submitted that if the Respondent was dissatisfied with the order, the proper course was for him to appeal against the decision rather than attempt to have the order deleted under the slip rule.

34. It is clear from the record (P243), that the Respondent's counsel had "vehemently" opposed the application before Samba J and had made the same arguments about what effects the stay would have on the Respondent, as were later made before Kamanda J.

35. It is noticeable however, that at no time, either before Samba J, when the Appellant moved the court for an order for stay, or before Kamanda J, when the Respondent moved the court to have the stay deleted or dispensed with, did the Respondent or his counsel proffer an alternative variation of the order (in the event that the stay should be granted, or amended, as the case may be) urging that the stay be restricted to the land claimed by the Appellant.

36. It is to be noticed that the order of Samba J was made the 28 July 2016, whilst the Respondent's Notice of Motion was dated the 26 May 2017 - some 10 months later. It seems to me that if the order had been erroneously drafted, this would have been manifest very shortly after it had been drawn up. It was therefore up to the Respondent to take prompt steps towards correcting the error.

37. It seems clear to me therefore, that the judge was fully aware and cognizant of the Respondent's concerns when she made her decision: The record shows that the judge made her decision after *"Having read the Affidavit in Opposition...."* and *"Having heard G B Kanneh Esq in opposition to the said application."* There is nothing to indicate that she was minded to restrict the stay to just the Appellant's land.

38. In my view, the decision was deliberate. The orders sought by the Appellant before Samba J had been clearly spelt out in the notice of motion. The Respondent received the notice informing him of the orders that the Appellant sought to obtain. The Respondent objected to the orders being granted and the judge took his arguments into consideration before granting the order that she did. She was clearly not persuaded by them. Whilst she was urged to refuse the stay, she nevertheless decided to grant it and in the form set out by the Appellant in his Notice of Motion.

39. After considering the application and counsel for the Appellant's reply, Kamanda J found in favour of the applicant and made the order amending the orders of Samba J, the effect of which was to restrict the scope of Samba J's order to the "three town lots" of the Appellant.

40. The judge appears to have been motivated by the need to do justice, as he perceived it. He said at page 254 of the record:

"it must be noted that our Court is a Court of justice and it has inherent jurisdiction also to ensure that justice is not only done but seen to be done. Barristers and Solicitors ought to be an integral part in helping to dispense justice. In that regard both lawyers ought to have brought to the attention of the judge that the Applicant was only interested in three Town lots that is a portion of land and not the entire portion claimed by the Respondent/Applicant.... I am clear in my mind that the fact that an order was made in respect of the entire land was a mistake or error arising in the judgement... In my view by correcting the error in this case can in no way lead to injustice or cause harm to no one, rather that will put the record straight and ensure that justice is manifestly seen to have been done."

41. Having considered the judgment of Kamanda J, I am of the view that he erred in making the orders that he did. It is clear that the application was for Samba J's order for stay to be "deleted and dispensed with". The Applicant wanted to enforce the order for possession but was of the view that the imposition of the prevented this. From the record, it does not appear as though counsel for the Respondent/Applicant specified that or how he wanted the order of Samba J to be amended. He was in fact applying for it to be deleted, but made the application under a rule that provides for correction of an erroneously drafted order. Counsel for the Appellant drew this to the judge's attention and pointed out to the judge that he ought not to entertain the application under the slip rule because the relief sought did not come within the ambit of the rule pursuant to which it was being made. Counsel for the Appellant did not argue the case under O23 R10. He was of the view that that rule did not apply, and so did not argue whether in fact the amendment sought was a clerical or administrative error. In his view, an application to vacate an order that a party is dissatisfied with, ought to be made on appeal.

42. I find it difficult to agree with Kamanda J, that Samba J intended to make the restricted order he made. Even if it were the case, as Kamanda J found, that Samba J intended to restrict the scope of the stay to the Appellant's land, this was not the argument advanced by the Respondent. He did not say that the judge intended to restrict the scope of the stay, and indeed, it is difficult to see how such intention could have been or can be imputed to her. The fact she did not restrict or specify the scope of the stay as she did in the case of the injunction, leaves the question open what her intention had been. In my view it is not clear that she had such intention, nor can it be shown that she erroneously failed to specify the land to which the stay applied. At best it is an arguable case, but it is not one that was argued by the Respondent. He argued simply that there

was a clerical mistake or an error arising from an accidental slip or omission that should be corrected under O23 R10.

43. For my part, I do not think it was Samba J's intention to make the restricted order and so I cannot see that it can properly be said that there was a clerical mistake or an error in the way that the order was drafted, or that any such error arose from an accidental slip or omission.

44. Samba's order granting a stay, read at face value, had the effect of staying execution of Magistrate Ganda's order for a writ of possession to issue against all the defendants to that action. Kamanda J's order whilst, attempting to restrict the effect of the stay to just the Appellant's land, did in effect, what the Respondent/Applicant had asked for; it dispensed with the stay. It had the effect of setting aside Samba J's order for stay and imposing a stay on the Appellant's land only. This in my view was way outside the scope of O 23 R 10 and was sometning that ought properly to have gone on appeal.

45. The judge also proceeded to make an order restricting the injunction to the Appellant's "three town lots" even though the Respondent did not apply for the injunction to be amended. On the contrary, the Respondent had in his motion applied that "that paragraphs 1 and 3 of the said order of this Honourable Court dated 28 day of July 2016 do stand unless otherwise ordered by this Honourable Court." There was therefore no need for the judge to have amended this order, especially so as that order, as drafted, already extended to covered the Appellant's land which was fully described in the order by reference to the survey plan and conveyance.

46. Kamanda J made reference to the court's inherent powers as a basis for making his orders. It is undoubtedly the case that the court has an inherent power to vary its own orders to make the meaning and intention of the court clear. However, I am not persuaded, as Kamanda J appears to have been, that this was a situation where the Court ought properly to exercise its power under its inherent jurisdiction.

47. For the reasons stated above, I would uphold the appeal.

Signed: *E Taylor-Camara*

Justice E Taylor-Camara, JA