

## IN THE HIGH COURT OF SIERRA LEONE

BETWEEN: JOHN T COLE

- PLAINTIFF

AND

MARY BORBOR &amp; MOHAMED BANGURA - DEFENDANTS

D G THOMPSON Esq for the Plaintiff

A I SESAY Esq for the Defendants

JUDGMENT

1. By Writ of Summons issued on 10 March, 2004, the Plaintiff, in his capacity as Administrator of the estate of the estate of his late father, REV SAINT JACOB COLE claimed against the Defendants jointly, a Declaration of title to property delineated and described in Vesting Assent dated 12 May, 1981 and duly registered as No. 298 at page 19 in Volume 327 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown; possession of the said property; Damages for Trespass; an Injunction; Further or other Relief, and the Costs of the Action.
2. According to the said Writ of Summons, JOHN ETHELRED COLE made a Will dated 19 December, 1946, in which he appointed JAMES COLE, SAMUEL COLE, BENONI COLE, ST GEORGE COLE and ST JACOB COLE, his Executors and trustees. He devised his lands situate off Main Motor Road, Kissy, measuring 0.7287 acre to his children. By Vesting Assent dated 12 March, 1981 one of the Executors, ST JACOB EDWIN COLE, assented to the vesting of this property in himself as beneficiary. The Defendants have been trespassing on this land, and will continue to do so, unless restrained by this Court. Further, the Plaintiff claims that by Judgment dated 12 July, 1991 EBUN THOMAS, J now deceased, had declared that ST JACOB EDWIN COLE was the owner of this property. The Plaintiff therefore asked for a Declaration of Title to this property, and for ancillary relief.
3. On 19 May, 2004 a Defence and Counter claim was filed on behalf of the Defendants by EDDIE TURAY & ASSOCIATES. In it, the Defendants denied that they had entered Plaintiff's land; on the contrary, they

contended that the Plaintiff had sold the only property he owned, to one ALPHA CONTEH, as evidenced in Deed of Conveyance dated 8 May, 1971 and duly registered as No 818 at page 28 in volume 250 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. They averred further, that the Judgment alluded to in the Writ of Summons, did not refer to the land claimed by them; and that they had been in quiet occupation and possession of the land since 1984. They counterclaimed for a Declaration of title to the land they were occupying, and for ancillary relief.

4. The Plaintiff in his Reply and Defence to Counterclaim, restated his claim, and denied that the Defendants had title to the property. He therefore joined issue with them.
5. Surprisingly, on 2 June, 2004 yet another Defence was filed, this time on behalf of the 1<sup>st</sup> Defendant alone, by ANSUMANA SESAY Esq of Frank Kargbo & Co. How it is that these two Defences were allowed to stand, without one of them being struck out defies the imagination. It was the same, when Appearance was entered. EDDIE TURAY & ASSOCIATES entered appearance for both Defendants on 1 April, 2006; on 13 April, 2006 ANSUMAN<sup>A</sup> SESAY Esq entered appearance for 1<sup>st</sup> Defendant alone. Two appearances cannot stand; nor can two Defences stand. The Master should have refused to sign the second appearance until and unless the first one was withdrawn. Also, the Master should not have accepted for filing, the second Defence filed by Mr Sesay. I will at the end of the day, have to decide the effect this duplicity has on the case as a whole.
6. For what it is worth, the Defence filed by Mr Sesay, avers that by virtue of a Power of Attorney dated 2 June, 2004 1<sup>st</sup> Defendant became the Attorney of ALHAJI SHEKU KAMARA, the fee simple owner of property situate, lying and being off Kissy Bye Pass Road, Kissy Mess Mess, measuring 0.4993 in area. It is averred further that there is a permanent dwelling-house on the land occupied by relatives of 1<sup>st</sup> Defendant, and that 1<sup>st</sup> Defendant has been in long and continuous possession of the land. The 1<sup>st</sup> Defendant relies on Section 12 of the Limitation Act, 1961 and claims that the Plaintiff's claim is statute-barred. I have not seen a reply to this Defence. The Action had already been entered for Trial on 2 June, 2004.

*MS*

7. An Application for speedy trial was made by the Plaintiff, and it was Ordered by TUNIS,J as she then was, on 8 July,2004. There was also an Application for an Interlocutory Injunction , which was granted by KAMANDA,JA on 5 June,2006.
8. The Trial commenced before KAMANDA,JA on 11 February,2005 with the Plaintiff, JOHN TUNDE COLE giving evidence asPW1. He said his father was Rev St Jacob Edwin Cole, then deceased; that he obtained Letters of Administration in respect of his deceased father's estate; that he knew the property situate off Main Motor Road, Kissy, that it constituted part of his late father's estate. The property had been given to his late father by his Grand Father. The Defendants wrongfully entered upon the land and began erecting structures thereon; at the time his father was alive; there were Court proceedings and Judgment was given in favour of his father in the High Court. Notwithstanding the said Judgment, Defendants continued occupying the property until he himself became Administrator. After several adjournments, on 18 April,2005 he identified the Judgment as "Z" and the Letters of Administration as "Y". After certain Interlocutory proceedings, he continued testifying on Monday 6 November,2006 during which testimony , he described the land previously owned by his father, but as he could not tender any document, Mr Thompson, his Counsel applied for leave to interpose a witness from the Administrator-General's Office. But after several adjournments, PW1 continued his testimony on 25 Febraury,2007 during which he said, inter alia, that he had not sold nor leased the property to Defendants. When he discovered their acts of Trespass, he caused a letter to be written to them, but he had not got the copy with him that day.
9. Finally, on 22 October,2007 Mr Victor Horton, Principal Assistant to the Master, was called to testify. He could not conclude on that day because objection taken to the document he was about to tender. Eventually, on 2 November,2007 he tendered as "A" a certified true copy of a Judgment in the matter intitled C.C. 510/84 C No. 32 Between: Rev St Jacob E Cole as Plaintiff and Abu Bakarr Kamara as Defendant, delivered on 25 October,1991. KAMANDA,JA soon after took up appointment as Judge in the Appellate Chamber of the Special Court for Sierra Leone, and the file was assigned to me, with effect from 31 January,2008. Both Mr Thompson, Counsel for the Plaintiff, and Mr A I Sesay, Counsel for 1<sup>st</sup>

Defendant consented to the continuation of the Trial before me. 2<sup>nd</sup>

Defendant has never appeared before me, nor has he been represented.

10. On 7 May, 2008 Plaintiff interposed and called a witness, PW3, Roland Brima Samura, a clerk in the Administrator-General's Office, who tendered in evidence, Vesting Assent dated 12 March, 1981 duly registered as No298/81 at page 19 in volume 327 of the Record Books of Conveyances. On the next adjourned date, 9 May, 2008, he tendered the certified true copy of the Assent as "B1"
11. PW4 was Andrew Marke, Officer-in-Charge, Probate Registry of the High Court. He tendered in evidence, Letters of Administration granted in respect of the estate of St Jacob Edwin Cole on 2 June, 2003, as "C", and a certified true copy thereof as "C1". Thereafter, PW1 was recalled to resume his testimony.
12. He began by identifying "C1" as his authority for instituting the action. He asked the Court for the Reliefs prayed for in the Statement of Claim. He was subjected to cross-examination by Mr Sesay, Counsel for 1<sup>st</sup> Defendant. In answer to Mr Sesay, PW1 said inter alia, that the action evidenced by "A" was brought by his late father in respect of the same piece of land in dispute in this action. He said his father sold part of the land to ALPHA CONTEH, but he did not know the size of the portion sold. The Declaration made by him in the LA was true and correct; in it, he declared 3 pieces of land: a) house and land situate at 38 ThunderHill Road, value Le7m; b) House and land at 38B THunderHill Road, value Le500,000; house and land at 38c ThunderHill Road, value Le3m. There are 3 pieces of land, numbered 38, 38B and 38C. 38C is an unfinished building constructed with cement blocks.
13. He identified "B1" as a document executed by his late father. The property declared in the LA, is the same that his father vested in himself as beneficiary. He agreed that 38 Thunderhill Road was not declared in the LA. He did not know Hannah Cyprian. His grandfather did not build on the land; nor did his father; nor himself; he did not know how his grandfather got the land; he did not know whether his father had a title deed for the land. His grandfather's will was referred to in "B1". When shown "C1", he said it showed that 38B belonged to them. He had never looked at his grandfather's will though it was referred to in his Writ of Summons. The land was situate off Main Motor Road, Kissy. He agreed his

father sold part of the land to Alpha Conteh, but he did not know the acreage sold. His grandfather was not a farmer.

14. Plaintiff's last witness, was PW4, MALCOLM JONES who testified on 3 June, 2008. He said the Plaintiff was his cousin, and that he knew both Defendants. He knew land situate off Main Motor Road, Kissy to be the property of his late Uncle, St Jacob Cole. He knew Judgment in respect of that land was at one time given against one Kamara. At present, part of the land is occupied by 1<sup>st</sup> Defendant and there is a building on it. He was aware part of the land had been sold by his Uncle to somebody else. He visited the locus as Ordered by KAMANDA, JA in 2007 at the invitation of Mr Thompson; he observed a building under construction; the one occupied by 1<sup>st</sup> Defendant was completed. He was not aware that his late uncle sold land to Defendants. He was cross-examined by Mr Sesay on 3 July, 2008. Under cross-examination, he said, that Court action was instituted by his late uncle against AbuBakarr and that he accompanied his uncle to Court. He could not tell how many town lots his uncle sold to the 3<sup>rd</sup> party. He was a party to the LA granted in respect of his late uncle's estate; he was a Bondsman. His uncle had not erected a building on the land before he died. Though his uncle did not at any time show him his documentary title to the land, he discussed it with him. He said 1<sup>st</sup> Defendant's building is older than the other one on the land. He was insisting that 1<sup>st</sup> Defendant had built on his uncle's land.
15. On 9 July, 2008, Plaintiff closed his case, and 1<sup>st</sup> Defendant opened hers' on 24 September, 2008. She called ABU BAKARR KAMARA of 38B Thunderhill Raod, Kissy. He is unemployed. 1<sup>st</sup> Defendant is his mother. The property at 38B Thunderhill Road, Kissy was bought by his father Alhaji Sheku Kamara and his mother, 1<sup>st</sup> Defendant in 1984. He identified a copy of his father's conveyance. His father began building on the land in 1984. He went into occupation on 30 March, 1986. The entire family moved in, and his father rented out the adjoining. He produced and tendered in evidence, as "D1-25" City Council Rate Demand Notes; he also produced and tendered NPA Quotation form and 2 Bills as "E1-3". He identified his father's conveyance. They were living in the house at Thunderhill Road until 30 July, 2003 when Plaintiff went there with an Ejectment Summons. They came to Court No.1A; and in 2004 they were served with a Writ of Summons. He tendered the Power of Attorney given by his father to his mother as "F". In answer to Mr Thompson under cross-examination, he

said that he did not know when his father began making arrangements for the purchase of the land.

16. DW2 was the 2<sup>nd</sup> Defendant herself. She did not know Plaintiff. Both herself and her husband Alhaji Sheku Kamara built a house at 38B Thunderhill Road in 1984, and took up occupation in 1986. Her husband bought the land from Gibrilla Kanu, and that a conveyance was executed in his favour. She ended by saying Plaintiff did not own the land. In answer to Mr Thompson, she said she was not present during negotiations for the land.
17. Her last witness was DW3, the Deputy Mayor, Gibrilla Kanu. He came from Russia in 1983 and was aware of the transaction for the sale of the land to 1<sup>st</sup> Defendant's husband. He was present when Alhaji Hassan Turay paid a deposit for the land to his father. He paid Le2,500 for 6 town lots. He said also that he was present during the sale to 1<sup>st</sup> Defendant's husband. He deposited the sum of Le2,500 in November, 1983. His father was Alhaji Ibrahim AbuBakarr Kamara. 1<sup>st</sup> Defendant's husband was given a receipt. He later paid an additional sum of Le2,000. He made the final payment in 1984. His father had been in possession of the land for between 12-13 years before selling it. Nobody else was claiming the land. He did not know the Coles. In answer to Mr Thompson on a later date, DW3 said he was familiar with the property at Bye Pass Road Kissy, and that his father sold the land to 1<sup>st</sup> Defendant's husband. He was shown exhibit G which had been tendered earlier.
18. DW1 was recalled to tender in evidence his father's conveyance, as "G"; and photocopies of the City Council Demand Notes as "D1 pages 1-25"; in view of this "D1-25" were returned to 1<sup>st</sup> Defendant. Mr Sesay did not close the 1<sup>st</sup> Defendant's case that day; therefore, on the next but one adjourned date, i.e. 4 November, 2008 when he was again absent, I closed his case. As 2<sup>nd</sup> Defendant had not appeared throughout the trial, either by himself, or by Counsel, I also declared his case closed, as he was entitled, even though he had not filed pleadings, to cross-examine witnesses in Court, if present, when they were testifying. Mr Thompson suggested that written closing addresses be submitted. Judgment was reserved that day. Written addresses were submitted by Counsel on both sides, but neither of them addressed the issue which I believe is the deciding factor in this case.

19. The first issue I have to deal with, is that relating to the two appearances entered on behalf of the 1<sup>st</sup> Defendant, and the two Defences filed on her behalf. It is clear, that both sets of documents cannot stand. It follows that the appearance entered by Mr Sesay on 13 April, 2004 on behalf of the 1<sup>st</sup> Defendant cannot stand, and is therefore struck out. Likewise, the Defence and Counterclaim filed by him on 2 June, 2004 is irregular, and is also struck out. We are therefore left with the appearance entered by Eddie Turay & Associates on behalf of both Defendants, and the joint Defence filed on their behalf by these same Solicitors on 19 May, 2004. Notwithstanding the striking out of the appearance and defence and counterclaim, respectively, filed by Mr Sesay, his appearance as Counsel was, and is regular, and his participation in these proceedings as Counsel is, and was, therefore regular.
20. The second issue I have to deal with, is that relating to the 2<sup>nd</sup> Defendant. Notwithstanding his absence at the trial, and the absence of any Counsel on his behalf, as Mr Sesay made it clear to the Court he had no instructions to act on his behalf, I still have to consider the case brought against him. Regrettably, no evidence has been led by the Plaintiff to show that this Defendant had, or has anything to do with the property claimed by Plaintiff. No Deed of Conveyance in his favour, or in his name, has been tendered, showing that he is laying claim to Plaintiff's property, or any part thereof; nor has any Surveyor's Report or evidence, detailing the extent of his alleged trespass, been tendered or adduced in this Court. The case against him therefore fails.
21. As regards the 1<sup>st</sup> Defendant, it appears, on the evidence, that she is not the owner of the property. Her husband is the owner. The husband did give her a Power of Attorney on 2 June, 2004 and it was duly registered, and later tendered as exhibit "F". That Power was only conferred on 1<sup>st</sup> Defendant, nearly 3 months after these proceedings had been instituted by Writ of Summons dated 10 March, 2004. At the time the Writ was issued, the 1<sup>st</sup> Defendant had no power to deal with the property. The Power of Attorney empowered her, among other things, to take possession of his property situate off Bye Pass Road, Kissy Mess, and to institute and/or defend any legal action that may arise affecting the said property. Her husband was a disclosed Principal, and remained the fee simple owner of the property whose conveyance was witnessed in exhibit "G". As she has not laid claim to the property claimed by the Plaintiff, no

Declaration of title could be made in favour of the Plaintiff, against her. She freely admits in her evidence that she resides at 38B Thunderhill Road, Kissy, the property she says her husband bought in 1984, and denies that the Plaintiff owns the land. As she is partly in possession of the property by virtue of another person, her husband, who claims to be the owner thereof, and who is not a party to these proceedings, it would be quite impossible and improper for this Court to hold that she is a trespasser. In this respect she is relying on the principle of Jus Tertii, and I believe she is right in doing so. The proper party was, and is, clearly, her husband. The action against her therefore fails, and she is entitled to the Costs of this action.

22. I cannot end without expressing my sadness that what otherwise appeared to be a good case, has failed because the real party to the dispute, was not sued. Plaintiff's Solicitor and Counsel will have to bear responsibility for this mishap.

  
N C BROWNE-MARKE

Justice of Appeal

23 April, 2010.