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C.C. 276/11 2011 P No. 12

IN THE HIGH COURT OF SIERRA LEONE

LAND AND PROPERTY DIVISION

BETWEEN

DARRELL EDWARD PALMER - PLAINITFFS

NORRELL EWEN PALMER

AND

CHERNOR SESAY & OTHERS - DEFENDANTS

COUNSEL:

E T KOROMA ESQ for the Plaintiffs

C O A TIMBO ESQ and MS E Y S COLE for the 1st Defendant

The other Defendants were not parties to the Application before the Court, and did not appear

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE

JUSTICE OF APPEAL

JUDGMENT DATED THE 19 DAY OF OCTOBER,2012.

1. The 1st Defendant has applied to this Court by way of Notice of Motion dated 23 July,2012 for the following Orders: (1) That this Court strikes out the action brought before it by the Plaintiff pursuant to Order 21 Rule 17(1)(d) as the said action begun by writ of summons dated 21 September,2011 constitutes an abuse of the Court process, in that the same matter has already been adjudicated upon and judgment given; (2) any other Order the Court may deem necessary in the circumstances; (3) that the Costs of this Application be borne by the Plaintiffs.
2. The Application is supported by two affidavits deposed and sworn to by the 1st Defendant on 23 July,2012, and by Ms Cole on 5 October,2012 respectively. To these affidavits are exhibited several documents. Because of the lapse of time between the date of the Application and the first date of hearing, I must point out that the Application was filed during the vacation on 23 July,2012, and only assigned to this Court on 13 September,2012, on which date, I instructed my Registrar, as appears in my minute in the inside front cover of the file, to invite Counsel to fix a date for the hearing. I understand Ms Cole asked for the 4th instant, the day she began moving the Court. Further, I must also point out that

though the writ of summons was issued against the 1st Defendant and 6 others, this Application has been made on behalf of the 1st Defendant only. The Motion was not addressed to the other Defendants, and they did not appear in Court.

3. To the 1st Defendant's affidavit, are exhibited the following documents: CS1 is a copy of a writ of summons issued in the action intitled: cc 608/04 - Norell Palmer v Chernor Sesay. The claim in that writ, was for a Dec aration of title to land situate lying and being at Hamilton village owned by the estate of the late Earnshaw Palmer who had died testate in 1990. The 1st Defendant herein was the sole Defendant therein.
4. CS2 is a copy of an '*Independent Report of the site verification survey of the property under dispute between Earnshaw Palmer and Chernor Sesay*'. It was written and prepared by Rasheed Charles Ngiawee. The Report concludes in part, that: 1. "*The field data and subsequent computation results show that the property under claim by Mr Chernoh Sesay partly overlap(s) into the property described by the survey plan of Earnshaw Palmer. 2. The area of encroachment is calculated as 0.2297 acre i.e....9.7% of the acreage calculated for the survey plan of Earnshaw Palmer*".
5. CS3 is a copy of an Order of Court made by KONOYIMA,J. dated 10 July,2009. It Orders in part, that the Plaintiff is the fee simple owner of the property described in the Deed dated 18 June,1955, and duly registered. Further, that the Plaintiff is only entitled to recover from the Defendant, the extent of the encroachment by the 1st Defendant herein, i.e. 0.2297(8) acre. The Plaintiff was mulcted in Costs in the sum of Le2million, because, according to the Court, he had levied "*excessive execution of the High Court Judgment dated 7th November,2008.*"
6. CS4 is a copy of a letter dated 18 March,2009 addressed by Mr Elvis Kargbo, then Solicitor for the 1st Defendant, to Mr Oliver Nylander, then Solicitor for the 2nd Plaintiff herein, who was the sole Plaintiff in the earlier action.
7. At the hearing on 4 October,2012, I pointed out to Ms Cole, 1st Defendant's Counsel, that the Application was incomplete, as 1st Defendant had not exhibited the writ of summons in the present action, so as to enable the Court to compare both writs in the process of deciding whether there had been an adjudication on the merits in the

earlier action, in respect of the same subject matter. This necessitated the filing of the further affidavit deposed and sworn to by Ms Cole on 5 October,2012. To that affidavit are exhibited 5 sets of documents. EYSC1A&B are Notices of Appointment and of Change of Solicitors dated 6 July,2012 in respect of the 1st Defendant's current Solicitors, Solomon Jamiru & Co.

8. EYSC2 is a copy of a what appears to be the full Judgment of an unnamed Judge, delivered on 7 November,2008. It clearly adjudges and Orders that: "*... The Plaintiff ..is entitled to and (is) the fee simple owner of all that piece or parcel of land situate, lying and being at Hamilton village as evidence(d) by a Deed of Conveyance dated the 18th day of June,1955 and registered as No.28 at page 29 in volume 180 of the Record Books of Conveyances kept in the office of the Administrator and Registrar-General, Freetown. 2. That the Plaintiff (do) recover immediate possession of the said land. 3.....4. That the Defendant delivers up any deeds, instruments and survey plans touching and concerning the said land for both cancellation and rectification.*" Clearly, the Learned Trial Judge in that action, had given Judgment for the Plaintiff on his claim, without qualification and ambiguity. The trial was inter partes, as the Defendant therein who is the 1st Defendant herein, called 5 witnesses. If the 1ST Defendant was dissatisfied with that Judgment, his remedy was to have appealed. He did not do that.
9. According to exhibit EYSC3A&B, his then Solicitor, Mr Kargbo, applied by way of Notice of Motion dated 11 May,2009 that this Court determine "*.....the area of encroachment pursuant to the joint surveys report and the Judgment of 7th November,2008 to ensure the correct execution of the said Judgment; (and) 3.That this...Court award costs for excessive execution of the High Court Judgment dated 7th November,2008.*" This is what led to the Order made by KONOYIMA,J on 10 July,2009. So, instead of appealing, the Defendant had got, - I am not sure whether it was- the same Judge, as his or her name does not appear in the Judgment, or another Judge who has equal jurisdiction, and who had not tried the case, to vary and restrict the ambit of the Judgment given at the end of the trial. However, it appears from paragraph 3 of Ms Cole's affidavit, that it may have been the same Judge. That this was the intention of the 1st Defendant to vary the terms of the earlier Judgment,

is made evident by the contents of paragraph 4 of Mr Kargbo's affidavit in support of that Application, deposed and sworn to by him on 11 May,2009:He deposed: "*That it is clear from the said Judgment (i.e. the 7 November Judgment) that the only encroachment is about 0.2297 acre and it does not exceed further. That was the basis upon which the judgment was given.*" Of course, this is not true. I have, above, set out the clear terms of the Judgment: The Plaintiff therein was to recover immediate possession of the said land: the said land being that described and delineated in the Deed dated 18 June,1955. Perhaps, this explains the absence of the drawn-up Order of the Judgment of 7th November,2008. If KONOYIMA,J was the Judge who gave the Judgment dated 7 November,2008, he had not granted Liberty to Apply, which, at a stretch, would have enabled the parties to go before him again to clarify certain portions of his earlier Judgment. Whatever may be the case, it is also untrue, as deposed by Ms Cole in paragraph 3 of her affidavit, that the 7th November Judgment "*did not specify the acreage of land to be recovered.*" If the learned Trial Judge in the earlier action, had wished or intended to restrict the area of land to be recovered by the Plaintiff, he or she would have said so in quite explicit terms in the Judgment of 7th November,2008.

10. To return to the exhibits again, exhibit EYSC4 is a copy of the drawn-up Order of Court dcted 10 July,2009. The opening paragraphs of the Order suggest that the hearing was ex parte, and the Order made thereon, was also ex parte: The Order reads: "*UPON READING the Notice of Motion dated the 11th day of May,2009 including the affidavit in support sworn to the 11th day of May,2009 together with all exhibits attached thereto and filed herein; AND HAVING HEARD E KARGBO Esq., of Counsel for the Defendant/Applicant herein AND the Plaintiff/Respondent having filed no affidavit in opposition on his behalf AND HAVING considered the application herein and in accordance with Judgment of this Court dated the 7th day of November,2008, IT IS this day Ordered as follows:....*" The High Court Rules make it quite clear that any Order made or Judgment given ex parte, could be set aside by a Court of equal jurisdiction. The variation of the earlier judgment came 8 months after the earlier judgment. However, there is no Application before me for that Judgment of 10 July,2009 tc be set aside, and I will say no more about it.

11. Exhibit EYSC5 is a copy of the writ of summons in this action issued on 21 September,2011. The Plaintiffs herein are Messrs Darrell and Norrel Palmer; and the Defendants are the 1st Defendant, Haja Zainab Conteh, Sheka Turay, Ishmael Kamara, Ibrahim Kamara, Mr Harouna, Mr Amadu, Gbassay Kamara,all of Hamilton village. The particulars of claim aver that: "*1. The Plaintiffs are the fee simple owners and entitled to possession of all that piece and parcel of land situate lying and being at between Old York Road and Old Hamilton Road, Off Peninsula Road, Hamilton.....by virtue of a Vesting Assent dated 30th December,2009....the said piece of land is delineated on survey plan LS3292/09 dated 12th December,2009 and registered as No. 993/2009 at page 56 in volume 654 of the books of voluntary conveyances kept in the office of the Registrar-General..Freetown. (I think 654 is a volume in the Books of Conveyances, and not the Books of Voluntary Conveyances. Assents are usually registered in those Books.) 2. That Earnshaw Palmer died seised of .....property....registered as No. 395/29168/52 (plot 1) at page 69 in volume 171 and No.28/32953/56 (plot 2) at page 29 volume 180 in the books of conveyances....*" *3. That..... by his will (he) devised the said land.....to Darrell Edward Palmer and Norrell Ewen Palmer.*"
12. I must say that the particulars are insufficient as they are, to enable a Court to decide the Plaintiffs' claim on its merits. The dates the Deeds in paragraph 2 were made are not stated. The survey plan numbers and dates are not also stated. But that is a matter for the Plaintiffs. Our concern at present, is whether the merits of the action herein have been decided before. In other words, whether the 1st Defendant can convince the Court that the action herein should be struck out on the grounds of issue estoppel or Res Judicata, though neither Ms Cole, nor Mr Timbo have made any legal submissions in this regard.
13. In the earlier action, Judgment was given for the Plaintiff in respect of Deed dated 18 June,1955 and duly registered as No. 28 at page 29 in volume 180 of the Books of Conveyances. Part of the Plaintiffs' claim in the action herein is in respect of land conveyed by Deed No 28 at page 29 in volume 180 of the Books of Conveyances. None of these documents have been exhibited to any of the affidavits filed on both sides, and I deem this a dereliction of duty on the part of Counsel who have appeared before me. All documents pertinent to the Application, must be exhibited.

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How is the Court expected to decide fairly and properly as to whether the land in dispute in this action, was and is the same land in dispute in the earlier action in the absence of any documentary evidence identifying the lands in question? This is why after arguments had closed on the 11th instant, and soon after I had adjourned the matter, I directed my Registrar to request Counsel to submit to the Court copies of all Deeds referred to in the pleadings.

14. As I had set the date for Ruling, I did not require these deeds to be exhibited to affidavits. Mr Koroma sent in copies of deeds, one dated 12 July,1952 and duly registered which appears to be the deed in respect of the land described as plot 1 in the particulars of claim. The other, is the one dated 18 June,1955 and appears to be the deed in respect of the land described as plot 2, in the particulars of claim, and also appears to be the one in respect of which the earlier action had been brought. 1st Defendant's Counsel did not submit any documents.
15. The Defendants have filed an affidavit in opposition deposed and sworn to by the 2nd Plaintiff on 9 October,2012 (erroneously dated 9 February,2012). Leave was granted to Mr Koroma to use the affidavit in its defective form. The main thrust of the affidavit, is that the action herein is not the same as the earlier one. Also, that the 1st Defendant has taken a fresh step after becoming aware of the presumed identical nature of the claim in both actions, in that he has filed a defence and Counterclaim exhibited as NP4. In paragraph 4, the 1st Defendant averred that "....*this Honourable Court had in a matter brought by the 2nd Plaintiff touching and concerning the same land, had ruled on this matter and decided the area encroached on by the 1st Defendant.*" This does not really amount to a fresh step as contended by the Plaintiffs. It is in fact the proper thing to do if the Defendant in an action wishes to raise the issue. What the Defendant has done in this Application, is to seek a preliminary Ruling on the issue of Res Judicata and/or issue estoppel, or cause of action estoppel, rather than wait until the end of the trial.
16. In the leading case of CARL-ZEISS-STIFTUNG v RAYNER [1969] 3 All ER 897 Ch.D, BUCKLEY,J at page 908 says in the last line of paragraph H, that "...*the Court has, in my judgment, as I shall indicate, a discretion whether or not to strike out the plea.*" As to how the Court should proceed, the Learned Judge states at paragraphs C-D page 909: " *I do*

not think, however, that, because an issue is res judicata, the court in the exercise of its discretion should always strike out an allegation raising that issue. The Court, for example, might consider in a particular case that the better course would be for the claim of res judicata to be raised by pleading, which is, after all, the normal method of dealing with an estoppel, and dealt with at the trial. Or, the court might consider that the negligible importance of the subject-matter of the alleged estoppel made the cost of an application to strike out the offending plea unjustifiable, or that the opposite party had a triable answer to the alleged estoppel. It appears to me that, if a party adopts the course taken by the plaintiff here, it is for the applicant to show that to allow the offending plea to stand in the pleading will in fact give rise to one of the vices mentioned in RSC Order 18 r 19, of such a quality and in such circumstances that the court ought, in the exercise of its discretion, to strike out the offending matter. Every case must depend on its own facts."

17. I therefore have to decide whether the issues in dispute in this action have been decided by the earlier action, even though only the 2nd Plaintiff and the 1st Defendant were parties to that action. Further, if I so decide, whether I should go on and strike out the Plaintiff's claim on the ground that it amounts, in the words of Order 21 Rule 17(1)(d) of the High Court Rules,2007, HCR,2007, to an abuse of the process of the Court.
18. The plea of Res Judicata and/or issue estoppel and/or cause of action estoppel, are not restricted to just the identity of the parties, or, the identity of the land in dispute. Either plea could succeed if the issue canvassed by the Plaintiff in an action had been decided by a Court of competent jurisdiction on an earlier occasion. Several cases explain how the twin issues should be dealt with.
19. In ENGLAND & OTHERS v COSIER & OTHERS [1964-66] ALR SL 315 H.C. COLE, Ag C.J. presiding, the Learned Judge cited with approval an extract from HALSBURY'S LAWS OF ENGLAND Vol. 15 3rd Edition paragraph 355 at pages 324-325: " *The most usual manner in which questions of estoppels have arisen on judgments inter partes has been where the defendant in an action raised a defence of res judicata....in order to support that defence, it was necessary to show that the subject matter in dispute was the same (that is to say, that everything that was*

in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first suit), that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court."

20. In JOHNSON v OFFICIAL ADMINISTRATOR [1968-69] ALR SL 395 C.A. MARCUS-JONES,JA had this to say at page 398: " *The Court has inherent jurisdiction to stay an action which must fail. And if a party seeks to raise anew a question which has already been decided between the same parties by a court of competent jurisdiction, the fact may be brought before the court by affidavit and the statement of claim, though good on the face of it, may be struck out and the action dismissed even though a plea of res judicata might not strictly be an answer to the action. It is enough if substantially the same point has been decided in a proper manner."*
21. In IN RE THE ESTATE OF BROWN (DECEASED), BROWN, COLE and BROWN v KING & OTHERS [1968-69] ALR SL 232 H.C. FORSTER,J at page 235 cited with approval the relevant statement of the law in HALSBURY'S LAWS OF ENGLAND Volume 15, 3rd Edition paragraph 357: " *Where res judicata is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact. To decide what questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and is not restricted to the record." The following paragraph, para 358 adds: " A plea of res judicata must show either an actual merger or that the same point has been actually decided between the same parties." The parties are not the same in these cases but the important factor is that there has not, in my opinion, been an actual merger."*
22. Applying and Relying on the principles of Law expounded in these cases, I hold that at this stage of the proceedings, the 1st Defendant has not established that the issues in dispute in this action, have been decided conclusively in the earlier action, and that the action therefore, need not proceed to trial. In fact, what the 1st Defendant has done, is to remove the very plank of his submission by relying on the Order made by

KONOYIMA,J on 10 July,2009. That Order purported, ex parte, to vary the terms of the Judgment of 7 November,2008. Instead of recovering the full extent of the land described in the 1955 Deed, the 2nd Plaintiff herein was told that he could recover only 0.2297 acre. The latter Order has not been set aside, and therefore still stands. If anything, it is the 1st Defendant who has been guilty of an abuse of the process of the Court, by getting the Court, to vary, ex parte, its own final judgment given inter partes. The Plaintiffs' claim does not constitute an abuse of the process of the Court in the terms stated in Order 21 Rule 17(1)(d). The 1st Defendant's Application therefore fails.

23. The 1st Defendant's Application dated 23 July,2012 is dismissed for lack of merit, with Costs to the Plaintiffs assessed in the sum of Le4million, after taking into consideration the Costs Ordered by KONOYIMA,J on 10 July.2009.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE