C.C. 303/10 2010 K No. 4

IN THE HIGH COURT OF SIERRA LEONE
LAND AND PROPERTY DIVISION

BETWEEN:
JOHN KANGOMA KANAGBOU - PLAINTIFF
AND
PASTOR DAVID CHAMBERS - DEFENDANT

COUNSEL:
G K THOLLEY ESQ for the Plaintiff
M P FOFANAH ESQ for the Defendant

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF APPEAL
JUDGMENT DATED THE 9 DAY OF OCTOBER,2012

1. I have two Applications before me. The first is dated 9 February,2011 and is filed on behalf of the Plaintiff. In that Application, the Plaintiff is asking the Court for Leave to add two persons, Mr Samir Saad, and the Plaintiff's sister, Ms Martha Kanagbou as Defendants; and for Leave to amend his statement of claim. The second, is that dated 28 February,2011 filed by the Defendant in which he asks that the writ of summons issued by the Plaintiff on 19 November,2010 be struck out for non-compliance with Rules of Court. Further, that the Plaintiff's action is malicious, and also frivolous and vexatious. Because of the conclusion I have reached in respect of the 2nd Application, I need not call upon Plaintiff's Counsel to move the 1st Application.
2. The Defendant contends in his Application that since the Plaintiff alleged fraud in his statement and particulars of claim, he should have commenced the action by way of a generally indorsed writ, and not a specially indorsed one. This, it may seem, is a requirement of Order 6 Rule 3(g) of the High Court Rules,2007-HCR,2007. It reads: "*In actions where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest .....(and) (g) in all other actions in the Court except actions for libel, slander, malicious*

*prosecutions, seduction, breach of promise of marriage and actions in which fraud is alleged by the plaintiff, the writ of summons may, at the option of the plaintiff be specially indorsed with or accompanied by a statement of his claim or of the remedy or relief he claims to be entitled.*" This means that in actions where the plaintiff alleges fraud on the part of the defendant, he must issue what was, and is called, a '*generally indorsed writ*'. That expression no longer carries the importance it used to carry, but it is still widely used. This is why, I suppose, Mr Fofanah uses it in paragraph 1a) of the Defendant's Application. If he were to study the Rules in Order 6 carefully, he would note that that expression, '*generally indorsed writ*' is not used at all. That notwithstanding, Rule3(g) seems to be saying that, if fraud is alleged in the action, the Plaintiff has not got the option of choosing whether the writ of summons must be specially indorsed with, or, must be accompanied by, a statement of claim. He can only indorse it with, to adopt the phrase used in Order 6 Rule 1(1) HCR,2007, "*...a statement of the nature of the claim, relief or remedy sought in the action*" - what we usually call, '*a general indorsement*'. This, I believe, is the point Mr Fofanah wishes to make.

3. The difficulty with our Rules is that in some areas, they constitute an amalgam of the English Pre-1980 Rules and the 1999 Rules. Thus, we have retained the procedure of entering appearance to a writ of summons, and the distinction between what was previously known as a generally indorsed, as against a specially indorsed writ of summons. But at the same time, we have adopted the post 1999 attitude towards irregularities and anomalies in procedure. Thus, Order 2 Rule 1(3) HCR,2007 provides that "*The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by originating process other than the one employed.*" It follows that the irregularity complained of by the Defendant, no longer renders the proceedings a nullity automatically, as before. The Court has a discretion whether to allow the proceedings to continue if this is possible in the circumstances, for instance, by allowing the Plaintiff to rectify the irregularity by amendment of his pleadings. Further, the Court will also look at the stage the proceedings have reached. If they have just begun,

the Court will be more inclined to set aside the process for irregularity, as the Plaintiff could recommence the action if he so desires, after correcting the irregularity. And because the Defendant is also asking that the writ be struck out because the action therein is frivolous and vexaticus, I shall also have to advert my attention to these issues.

4. The Defendant's Application is supported by the affidavit of Mr Fofanah himself, deposed and sworn to on 28 February,2011. Exhibited thereto as "B" is a copy of the writ of summons dated 19 November,2010. Reading through it, one could easily see why Mr Fofanah alleges on the face of the motion paper, that it constitutes '*malicious prosecution occasioned by his (i.e. the Plaintiff's) own mistake.*" Also, that even though Mr Tholley has not specifically used the word "*fraud*" to describe the actions of the Defendant, it is clear that what the Plaintiff is alleging is that the Plaintiff's sister, and maybe Mr Samir Saad perpetrated a fraud on him, and not that he, the Plaintiff, was only mistaken about what Mr Saad had allegedly done. The Defendant only came into the picture because Plaintiff's sister Ms Kanagbou sold the property at 56 Upper Waterloo Street to him. The particulars averred by the Plaintiff himself, disclose that the Defendant was in all probability, a purchaser for value without notice.
5. To buttress the point I am making, I need only refer to the Plaintiff's Application dated 9 February,2011. In his affidavit in support of the Application, deposed and sworn to by Mr Tholley the same day, Mr Tholley deposes in paragraphs 3&5 as follows: "*That I have received revised instructions from the said Plaintiff regarding the nature of the transactions between himself and Mr Samir Saad as well as the nature of the transactions between himself and Ms Martha Kanagbou. .....That I verily believe that there are real questions in controversy between the said Plaintiff and the said Mr Samir Saad in the first instance, and between the former and the said Ms Martha Kanagbou, which ought to be inquired into by this Honourable Court.*" Mr Tholley could not have become aware of the culpability of Ms Kanagbou and Mr Saad and/or the alleged duplicity displayed by the Plaintiff's sister, Ms Kanagbou only in February,2011. The facts are laid bare in the writ of summons issued on 19 November,2010. He could not therefore have received '*revised instructions*.' The difference between that writ and the proposed

amended writ, is that both Ms Kanagbou and Mr Saad are now referred to respectively as 2nd and 3rd Defendants. Nothing else has changed. There has been no allegation that the Defendant colluded or conspired with Ms Kanagbou and Mr Saad to deprive the Plaintiff of his property.

6. It is clear therefore, that on the basis of the writ of summons as it presently stands, the Plaintiff really has no claim against the Defendant. Order 21 Rule 17(1)(a) & (b) and (2) provides as follows: " *The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement on the ground that- (a) it discloses no reasonable cause of action or defence, as the case may be; (b) it is scandalous, frivolous or vexatious.... and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be. (2) An Application under this rule shall be deemed to invoke the inherent jurisdiction though not mentioned* as well as that given by this rule."
7. In the case of HORSE IMPORT AND EXPORT COMPANY LIMITED v INSPECTOR-GENERAL OF POLICE, THE UNDER SHERIFF, and IBRAHIM BAZZY, Judgment delivered on 4 April,2012 I explained what all this means: "*He (Mr C.F. MARGAI) also referred the Court to the case of PALMER v STOOKE WACA Civil Appeal 7/53 14 WACA 333 at page 335; also reported at [1950-56] ALR SL 325 Judgment delivered by FOSTER-SUTTON, P. This was, I believe, in support of his argument that if the 3rd Defendant failed in respect of the first leg, i.e. paragraph (a) of Rule 17(1), it should also fail under paragraph (d). At page 327 of the latter Report, FOSTER-SUTTON,P states: "..The motion came on for hearing before Smith, CJ., who took the view that the whole of the Plaintiff's claim was hopeless and should not be allowed to proceed, and, acting under the inherent jurisdiction of the court, he summarily dismissed the action." At page 330 LL12 et seq, the Learned President had this to say: " In my opinion there is no substance in the submission. It is well settled that the court has inherent jurisdiction to stay an action which must fail. It is the case that such jurisdiction is not exercised except with great circumspection and unless it is perfectly clear that the action cannot succeed. In the present case, I concur with the Learned Chief Justice in thinking that the claim, if allowed to proceed, would be*

*bound to fail. This consideration satisfies me that the order dismissing it ought to be sustained, not in pursuance of any order or rule, but in virtue of the inherent jurisdiction of the court to prevent abuse of its process." What this case is saying is that if in the exercise of the inherent jurisdiction of this Court, which jurisdiction is recognised by, and reinforced in Order 21 Rule 17(2) HCR,2007, I come to the irresistible conclusion that the Plaintiff's claim is hopeless and bound to fail, I must stay the same.*

8. The conclusion I have reached is that though I need not set aside the writ of summons herein for Non-Compliance with Order 6(3)(g) HCR,2007, I have no alternative but to strike it out on the ground that it discloses no reasonable cause of action against the Defendant, and that it is frivolous and vexatious. Further, for the reasons I have given above, I hold that the Plaintiff's Application dated 9 February,2011 ought not to be granted, as granting the Order sought would negate the effects of the conclusion I have reached in respect of the Defendant's Application dated 28 February,2011. I cannot at one and the same time, set aside the writ of summons, and then go on allow the same to be amended. The Plaintiff is at liberty to issue a fresh writ of summons if he so wishes.
9. Lastly, I must apologise to Counsel and to their clients for the late delivery of this Ruling. It was only recently it was brought to my attention that this Ruling was still outstanding.

10. I THEREFORE ORDER as follows:

i. The writ of summons issued by the Plaintiff on 19 November,2010 is struck out because it discloses no reasonable cause of action against the Defendant, and because it is frivolous and vexatious
ii. It follows that the Plaintiff's Application dated 9 February,2011 for Leave to add parties as co-defendants, and to amend the writ of summons, is refused.
iii. The Defendant shall have the Costs of his Application dated 28 February,2011 such Costs to be taxed if not agreed.

iv. There shall be no Order as to Costs in respect of Plaintiff's Application dated 9 February,2011 as it has been refused in view of the decision I have reached in respect of the Defendant's Application.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE