

C.C. 586/07

2007

K No. 63

IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

AMADU KAMARA & MARIAMA KAMARA

(By their Agent LANSANA KAMARA)

- PLAINTIFFS

AND

ANDREW BELLA FOFANA JNR.

- DEFENDANT

COUNSEL:

M P FOFANAH ESQ for the Plaintiffs

J B JENKINS-JOHNSTON ESQ for the Defendant

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE

JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 1st DAY OF OCTOBER, 2012

1. There are two Applications before me. The first, is that dated 17 January, 2012 filed on behalf of the Plaintiffs. The Plaintiffs are, in that Application, asking this Court to commit the Defendant and/or his father to prison for contempt of the Order of WELLINGTON, J (since deceased) dated 9 December, 2011 - the 'December Order'; and, for an Order that the structure the Defendant has erected on the disputed land, be demolished.
2. The second Application is that dated 23 January, 2012 filed on behalf of the Defendant. The Defendant is in this Application asking for Order that the Order made by WELLINGTON, J on 9 December, 2011 be set aside for irregularity, in that it was an Interlocutory Order which had been granted ex parte, contrary to Rules of Court; and, that the Plaintiffs had given no Undertaking as to Damages at the time the Order was made.
3. In view of the Orders sought by the Defendant, I directed Counsel to argue the Defendant's Application first, as my decision thereon, would determine whether it would be necessary for the Plaintiffs to proceed with theirs. The issue of irregularity in the December Order has to be dealt with first, before the Court can go on to consider whether the Plaintiffs are entitled to the reliefs they seek in their Application. That notwithstanding, I think I can safely say at this stage that the Plaintiffs

are not in a position to obtain an Order for the Committal of the Defendant, because, on their own admission as set out in paragraph 3 of the affidavit of their Solicitor and Counsel, Mr Fofanah, deposed and sworn to on 17 January, 2012, the Defendant lives outside the jurisdiction, and there is no evidence before the Court that he was served with the December Order, or, that the same was brought to his attention. A party to litigation cannot be committed to prison for disobedience of an Order which he was probably unaware of. And as regards, the Defendant's purported agent, Adrian Dixon Bella, who is also said to be his father, he is not named on the face of the Motion paper, nor in any of the papers filed with it, as a Contemnor, which is the proper thing to do. In fact, there is what appears to be an error in paragraph 3 of the Plaintiffs' Motion, in that the "*Andrew Bella Fofanah*" referred to therein is probably the Defendant himself, and not his father, who is Adrian Dixon Bella. And for the sake of clarity, I should state that I certainly will not grant an Order for Committal of the un-named persons alleged in the same paragraph 3 to be "*...acting with him (i.e. the Defendant) in violating the aforesaid Order.*" If they are not named, they cannot be committed. I cannot issue a blanket Order, giving to the Bailiffs an unrestricted right to arrest all those whom they should consider as acting in the Defendant's interest.

4. Having said all of this, I do not think that, irrespective of the merits of Mr Fofanah's arguments, it could be gainsaid that Mr Jenkins-Johnston's contentions are quite correct. Where an Application for an Injunction is made, or an Order for such an Injunction is granted *ex parte*, such an Order cannot last for more than 7 days - see Order 35 Rule 1(9) of the High Court Rules, 2007 - HCR, 2007. Sub-Rule 1(10) clearly states that "*If no Application is made to the Court to extend the validity of the order it shall lapse after the expiration of 7 days from the making of the order unless the Court otherwise directs*". This is why this Court seldom grants an Interim Injunction for more than 24 hours at a time. The Applicant may think he is being smart by applying *ex parte* to the Court; but the penalty is that if that Court exceeds its jurisdiction, the Order made *ex parte*, like all such Orders, will be set aside by a Court of concurrent jurisdiction. So long as the Defendant was absent and unrepresented at the hearing, any Order made in his absence or in the absence of his

Counsel, would be an Order made ex parte, irrespective of whether or not the Application was addressed to the Defendant's Solicitors. The Court should, and could only have granted an Injunction against the Defendant, in his absence, and in the absence of his Counsel, for a period not exceeding 7 days simpliciter. WELLINGTON,J did so state in the last sentence in paragraph 1 of the 'December Order'. But because he went on to make the Order numbered 2, he nullified the effects of the caveat he had himself recognised in paragraph 1.

5. I note the contention in Mr Fofanah's affidavit in opposition deposed and sworn to by him on 10 February, 2012 that Defendant's Solicitors were served with the Application before WELLINGTON,J and that he spoke to Mr Jenkins-Johnston about it. That being so, he should have drawn WELLINGTON,J's attention to Sub-Rule 1(9); and he should have reminded the Court, that it could not, at that stage, go on to grant an Interlocutory Injunction, after it had granted an Interim Injunction lasting for not more than 7 days.
6. Mr Jenkins-Johnston also contends that the 'December Order' ought to be set aside for non-compliance with Rule 9(1) and (2). I have looked at the December Order and it is true that it does not Order or direct the Plaintiffs to give the required Undertaking. However, it is not quite as Mr Jenkins-Johnston puts it: it is not that the Applicants should give necessarily give the Undertaking before, or at the time of filing the Application. The requirement is that the Court cannot grant the Injunction without first Ordering that the Applicant provides the Undertaking. My view is that the Court can incorporate the Direction to provide an Undertaking in the same Order granting the Injunction, and therefore, need not do so at different times. Be that as it may, WELLINGTON,J omitted to give that direction, and the Plaintiffs could not, and still cannot enforce the Injunction granted without providing the Undertaking. For this reason as well, they are not entitled to an Order Committing the Defendant and/or his agents, to Prison.
7. I have studied carefully the opposing contentions in the respective affidavits deposed and sworn to by Mr Adrian Dixon-Bella in support of the Defendant's Application, and that of Mr Fofanah in opposition thereto. I do not have to decide on the merits of these respective contentions for the simple reason that Judgment has been reserved by

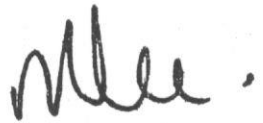
TAYLOR,J. The best I can do, is to ensure that the status quo pre commencement of litigation, is maintained.

8. Irrespective of whether an Injunction was sought by the Plaintiffs before TAYLOR,J or not during the course of the trial, it is my view that the Defendant and/or his agents cannot continue with building work while awaiting Judgment. If too much time has elapsed since Judgment was reserved, the proper thing to do, as both Counsel well know, is to appeal to the Judge or to the Chief Justice, for Judgment to be delivered. Whilst it will be most unfair, pending Judgment, to Order the Defendant and/or his agents to demolish whatever it is they have constructed on the disputed land, I also believe it will be unfair to allow or permit the Defendant to carry on with building work as if he has won the case. Happily, I have had the benefit of full argument on both sides, and neither side can complain that he has not, or they have not been heard. The justice of the case demands that WELLINGTON J's 'December Order' should not be set aside in its entirety.

9. I THEREFORE ORDER as follows:

- i. Paragraphs 1, 3 and 4 (wrongly numbered 3 also in the drawn-up Order) of the Order made by WELLINGTON,J on 9 December,2011 are hereby SET ASIDE. If the Costs Ordered to be paid, have been paid, they should be refunded to the Defendant.
- ii. Paragraph 2 of the said Order stands and is continued in full force and effect. Any disobedience of that Order will be punishable as Contempt. To this end, and to avoid confusion, that Order shall be re-drawn with only paragraph 2 appearing on its face, and shall be re-submitted to the Master and Registrar for his signature. Both that Order as amended, and this Order shall be served on Defendant's Solicitors, and shall be pasted on the prominent parts of the building on the land in dispute, and such service and pasting shall suffice for the purpose of any Contempt proceedings.
- iii. Paragraph ii above shall not come into force, or take effect unless and until the Plaintiffs have or, their duly appointed Attorney has filed an Undertaking as to Damages. In other words, the Undertaking must be given before the drawn-up Order is sent to the Master and Registrar for his signature.
- iv. The parties shall bear their respective Costs.

- v. In view of these Orders, it is un-necessary to proceed with Plaintiffs' Application dated 17 January,2012. That Application is therefore struck out without Costs.
- vi. There shall be Liberty to Apply for the purpose of giving effect to, or for explaining further, any of the above Orders.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE