CC 202/11 2011 C No. 2

IN THE HIGH COURT OF SIERRA LEONE
LAND AND PROPERTY DIVISION

BETWEEN:

WILMOT JOHNSON-COLE - PLAINTIFF
(As Administrator of the estate of Walmsley
J R Johnson-Cole, deceased intestate)

AND

WALTER JOHNSON-COLE - DEFENDANTS
WINSTON JOHNSON-COLE

COUNSEL:
J B JENKINS-JOHNSTON Esq. for the Plaintiff
1st Defendant appeared by his Wife and Attorney, MRS KADI JOHNSON-COLE
2nd Defendant appeared in person

BEFORE THE HONURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF APPEAL
JUDGMENT DELIVERED THE 13 DAY OF APRIL,2012

INTRODUCTION

23 FEBRUARY,2012 MOTION

1. By Notice of Motion dated 23 February,2012 the Plaintiff herein applied for Leave to be granted to him to issue a writ of possession to recover possession of the property situate at and known as 7B Madongo Town, Freetown from Mrs Kadi Johnson-Cole, the wife and Attorney of the 1st Defendant, pursuant to an Order of this Court dated 9 February,2012. Also, that the Costs of this Application be paid by Mrs Johnson-Cole.
2. The Application is supported by the affidavit of the Plaintiff deposed and sworn to on 23 February,2012. Exhibited to that affidavit, are the following documents:
   A is a copy of the writ of summons in the action herein, issued on 29 June,2011
   B is a copy of the Order of this Court dated 9 February,2012

C is a copy of a letter dated 16 February,2012 addressed to Mrs Kadi Johnson-Cole by Plaintiff's Solicitors

3. The Plaintiff also deposes that Mrs Johnson-Cole is still in possession of the property notwithstanding the Order of Court, the same having been conveyed to her by letter dated 16 February,2012, and that this is why he has come back to the Court seeking Leave to issue a writ of possession.
4. At the 3rd hearing on 8 March,2012 Mr Jenkins-Johnston informed the Court that neither the 1st Defendant, nor his wife, had been served with the Order of 9 February. A letter had indeed been addressed to both of them, forwarding the Judgment, but it had not been served as they were both outside the jurisdiction. Order 46 Rule 3(3)(a) states that: " *Such Leave (i.e. Leave to issue a writ of possession) shall not be granted unless it is shown - that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled;.....*"

MRS JOHNSON-COLE APPEARS

5. As such, Counsel could not, though the Application was ex parte, proceed with it. Hearing was therefore adjourned, first to 14 March, and then to 28 March, on which date Mrs Johnson-Cole appeared in person. She said she would wish to object to the Plaintiff's Application being granted. I explained to her that the Application was being made ex parte in accordance with Rules of Court, but that since she had not been served with the Order of Court of 9 February, I would allow her to be heard. I adjourned the hearing to 30 March. On that date, *Mrs Johnson-Cole sought another adjournment because her Solicitor and Counsel, Mr C F Edwards was in hospital. She was trying to see another Solicitor in his chambers.* In answer to a question put to her by the Court, she said she was still opposed to moving into 7A. I granted her an adjournment to 3 April. On 3 April the hearing could not proceed because the papers Mrs Johnson-Cole said she had filed, were not in the Court file. That date was the last day of the Easter term. I had to ask her whether she would consent to a hearing during the Easter vacation of the High Court. She consented. Mr Jenkins-Johnston also consented. I therefore adjourned

the hearing to Thursday 5 April. I took all these steps to ensure that 1st Defendant's voice, and that of his wife who was actually in occupation of No. 7B could be heard.

HEARING ON 5 APRIL,2012

6. At the hearing on 5 April the procedure I adopted was this: Instead of allowing Mr Jenkins-Johnston to move Plaintiff's Motion of 23 February, I allowed Mrs Johson-Cole to argue in favour of setting aside the Judgment of 9 February,2012 since that Judgment was obtained in the absence of 1st Defendant, her husband, and herself. At the commencement of the hearing that day, I had no papers before me, filed by or on her behalf. It was only when she had concluded her arguments, that I found out that a Motion asking for that Judgment to be set aside, had been filed on her behalf by one Mr Mamoud Sesay, who showed great discourtesy to the Court by not attending the hearing inspite of the latitude and consideration given and shown by the Court to his client. Before she commenced her arguments, I explained to Mrs Johnson-Cole that she was entitled to be heard in favour of setting aside the Judgment obtained in her absence, but also in favour of seeking relief from eviction from the property numbered 7B.

MRS JOHNSON-COLE'S ARGUMENTS

7. Her arguments went this way: She was applying for the Judgment to be set aside on the basis that she did not at any time expel her brothers-in-law from the property numbered 7B. Secondly, for over 6 months they had been refusing to allow her access to the property at 7A i.e. as from September,2011. She recalled that they told her husband on the phone, they did not want her in the compound. She arrived in Freetown in September,2010. They refused to allow her to renovate 7A. It was her husband's suggestion that they give her 7A because it was unoccupied, and even though he had spent money over the years upgrading 7B. But her brothers-in-law refused to allow her access to 7A. She reported the matter at the Congo Cross Police Station. She has only one room in 7B. Her family should have joined her in December,2010 but they could not as she had no accommodation for them. They, i.e. her husband and herself had never had dealings with 7A. Her late mother-in-law used to live in 7B

where her brothers-in-law also used to live. She used to stay in her mother-in-law's room. They left 7B of their own volition. She was there when 2nd Defendant, i.e. Winston, left the house at 7B. She ended by saying her husband was not willing to go to 7A.

1ST DEFENDANT'S MOTION DATED 4 APRIL,2012

8. It was at this stage that I realised Mr Sesay had filed papers on behalf of the Defendants. I think in this respect Mr Sesay is mistaken. He could not have been acting on behalf of both Defendants. The Notice of Appointment of New Solicitor dated 3 April,2012 exhibited to Mrs Johnson-Cole's affidavit deposed to on 4 April,2012 in support of the Application dated 4 April,2012, shows that she was the only one who instructed him. 2nd Defendant did not instruct him. It is therefore misleading for him to state for the record that that Application was filed on behalf of 2nd Defendant as well. Besides, the earlier proceedings, and Mrs Johnson-Cole's arguments set out above, show that both 2nd Defendant and Plaintiff have identical, not diverging, interests in these proceedings. Notwithstanding this faux-pas, and notwithstanding the fact that I had already Heard Mrs Johnson-Cole in argument, I went on to consider that Application on its merits.

MRS JOHNSON-COLE'S AFFIDAVIT OF 4 APRIL,2012

9. In her affidavit, Mrs Johnson-Cole said that she was the wife of 1st Defendant, currently resident in the United Kingdom. She was out of the country when the action commenced. She goes on to depose that *"paragraph 3 is not disputed."* I believe, she is here referring to the Plaintiff's affidavit of 23 February,2012. The correctness of this assumption is supported by what is deposed to in paragraph 4: " *That I did not receive the said letter dated 16 February,2012, referred to in paragraph 4 of the affidavit.*" She also deposes that "*paragraph 5 is not disputed*". That paragraph alleged that she was still in occupation of 7B. In paragraph 6, she deposes that "*I have spent considerable sums renovating 7b and it will be unjust for me to move to 7a when they have actually prevented me from having access to 7a and forced us into renovating 7b. The property, 7a has utility bills of about Le3 million. A copy thereof is exhibited and marked "A"*. There are two documents

exhibited as "A". The first one is a Bill for water consumed in respect of 7a. The Billing date is 28 February,2011. It shows that as at that date, the total amount owing as water rate was Le715,658.33. The second document is a bill from NPA dated 17 March,2012 and it shows that as of that date, the total amount due in respect of 7 (not 7a or 7b; nor 7a and 7b) was Le1,562,885. Therefore the total for both bills does not exceed Le2.3million, ~~more than~~ Le700,000 than the sum of Le3million quoted by Mrs Johnson-Cole.

10. In paragraph 7, the deponent deposes that "*Unfortunately, I do not have receipts of all payments made towards renovating 7b because I took them to my husband so he could see how I spent the sums received from him. The outside of 7ab (sic) will show that the renovations were carried out.*" The Plaintiff has not brought a claim based on repairs done by him to 7b. His argument is that there was an agreement between the brothers that he and 2nd Defendant should occupy 7b. So, if the 1st Defendant and his wife assert that they or either of them or one of them carried out repairs to 7b, he or she, or both of them must provide proof of this to the satisfaction of the Court. He who affirms must prove. To say one carried out repairs, without even a scintilla of evidence to support such a claim carries no weight with, and in a Court of Law. I have given sufficient time to Mrs Johnson-Cole to prepare her arguments. I even delayed giving Judgment on Wednesday last the 11th instant, because she, on the morning of that day, presented the Court with an email purporting to come from her husband. It is unsigned. She also showed me some pictures which she says depict the current dilapidated state and condition of 7A. This may be the principal reason why she does not think it fit that she should be made to occupy that house. As regards the email, I take judicial Notice of the advances made in telecommunications technology, and venture to say that these, days, documents can be signed and scanned and forwarded by email. All the same, in the interests of justice, I postponed delivering judgment so that I could give due consideration to what 1st Defendant supposedly had to say. Even there, he too referred to monies spent without an iota of evidence to support his claims.
11. A document headed "*Kadi Johnson-Cole's defence in support of motion*" is also attached, though not exhibited to her affidavit. The document merely reiterates ad nauseam the arguments presented by her in Court,

and purportedly, by her husband, in the email I have referred to. It also shows that there is considerable bad blood between the Plaintiff and 2nd Defendant on the one side, and Mrs Kadi Johnson-Cole on the other. I am not so sure what the state of affairs is between the brothers in Freetown on the one hand, and the brother in the UK on the other. That is not however a matter of concern in these proceedings. This was, I believe the sum total of the case presented by Mrs Johnson-Cole on behalf of herself as a person in occupation of 7B, and, on behalf of her husband, the 1st Defendant herein.

MR JENKINS-JOHNSTON'S REPLY

12. Mr Jenkins-Johnston had little to say in Reply. He pointed out the errors in the papers filed, but I said to him, I had decided to overlook these obvious errors, which had been noted by the Court, in the interests of justice. He referred the Court to the letter dated 31 March,2011 exhibited to the Plaintiff's affidavit of 11 October,2011 as "F1". Since this hearing was now being held to set aside the Judgement of 9 February,2012 which was given in respect of the Application dated 11 October,2011, it was quite proper for Mr Jenkins-Johnston to refer to and make use of this document. The letter states inter alia: "...*My instructions are to request that the keys to the three bedroom apartment previously occupied by your deceased brother be handed over to my client for her personal ~~client~~ use. My client needs the flat so that she could have a convenient place to live as that is the wish of her husband. She will in turn hand over to you the one room she occupies.*" The one room she then occupied, and still occupies, was and is a room in 7B. So, the position is that in March,2011 Mrs Johnson-Cole was ready to move into 7a notwithstanding all the monies she had allegedly spent in repairing 7B. Obviously, things could not have happened as expected, because Plaintiff had to issue a writ of summons against her on 29 June,2011 to get her to move out of 7B into 7A.

REASONS FOR ADJOURNMENT OF JUDGMENT - EMAIL FROM 1ST DEFENDANT

13. As I have stated above, I should have delivered Judgment in this matter two days ago, but for the emergence of the email purportedly, from 1st

Defendant. Apart from the recital of the work he or his wife had done in 7B, the only thing else of importance in the email, is that he denies entering into any agreement with his brothers that they could occupy 7B and he and his wife could occupy 7A. The Plaintiff and 2nd Defendant say otherwise. It is for this Court to decide whose account it should accept. There is no written document to the effect as to the division of the properties in question. This is quite common among creole families. Arrangements are often made between, and among siblings, as to how the properties of deceased parents should be shared out.

MR EDWARDS' LETTER OF 31 MARCH,2011

14. The only thing in writing supporting the contention of both Plaintiff and 2nd Defendant, is the letter dated 31 March,2011 written by C F Edwards sq on the instructions of Mrs Johnson-Cole. Neither 1st Defendant, nor Mrs Johnson-Cole has clearly and unequivocally disavowed that letter or, its contents. It means that they still stand by its contents. If that is so, it gives support to the Plaintiff's claim that this was what was agreed by the brothers: that 1st Defendant and his wife should share 7A with the son of their deceased brother, whilst Plaintiff and 2nd Defendant should share No 7B. It has not been alleged that Mr Edwards acted without being so instructed; nor that he exceeded his instructions; if that were the case, it would constitute misconduct on his part, and Mr Edwards could well face the disciplinary process of his professional body at the instance of Mrs Johnson-Cole. It seems to this Court however, that Mrs Johnson-Cole seeks, at one and the same time, to confirm these instructions, but wishes this Court to act as if they had not been given by her. This, the Court cannot do. Whilst Mr Edwards was in hospital, Mrs Johnson-Cole did not seek the services of a Solicitor in another chambers, but a Solicitor in Mr Edwards' chambers, Mr Mamud Sesay to continue to represent her interests. This shows that Mr Edwards still enjoys her confidence.

INTERIM ORDER OF 5 APRIL,2012

15. At the close of the hearing on 5 April, I made an interim Order that the keys to 7A should be handed over to Mrs Johnson-Cole. At the hearing on the 11th instant, she confirmed they had been handed over to her. No

explanation was given as to where they were retrieved from, or, how they were retrieved. I was satisfied however that the Order of the Court had been carried out, and was prepared not to enquire into how it was carried out.

FINDINGS

16. In sum, neither the 1st Defendant, nor his wife and Attorney has shown good reason why the Judgment given in their absence on 9 February,2012 should be set aside. They have no defence to the Plaintiff's claim. That there was an agreement that Mrs Johnson-Cole should move into 7A could be implied from, and is proven on a balance of probabilities, by the contents of Mr Edwards' letter. This Court cannot permit the 1st defendant nor his wife and Attorney to resile from that agreement.
17. The Application made by both 1st Defendant and Mrs Johnson-Cole to set aside the Judgment dated 9 February,2012 is therefore dismissed with Costs to the Plaintiff, and to the 2nd Defendant, such Costs to be taxed, if not agreed.
18. Mr Jenkins-Johnston can now proceed with the Plaintiff's Application dated 23 February,2012 for Leave to Issue a writ of possession.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL