

C.C. 980/06

2006

B No. 7

IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

ALLIE BANGURA - PLAINTIFF

AND

KEMOH TURAY - DEFENDANT

COUNSEL:

M S BANGURA ESQ for the Plaintiff

C F EDWARDS ESQ for the Defendant

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE

JUSTICE OF APPEAL

DECISION DELIVERED THE 1 DAY OF JUNE, 2012.

1. By writ of summons dated 1 December, 2006 the Plaintiff prayed for certain reliefs against the Defendant, one of them being a Declaration that the Plaintiff was the owner of all that piece or parcel of land situate lying and being off the New Freetown/Waterloo Road, Wellington, Freetown. The Plaintiff's property measures 0.1696 acre and is delineated on survey plan LS256/87 which is attached to Deed of Conveyance dated 8 May, 1987 and duly registered as No. 827/87 at page 38 in volume 402 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. The Plaintiff's vendor was one Amadu Tarawally of 14 John Lane, Wellington, now deceased. The Defendant denies that the Plaintiff is the owner of the property in dispute in his statement of Defence filed on 22 July, 2008. He avers that he is the owner of the property delineated in survey plan LS 1990/02 dated 22 November, 2002 drawn and attached to Deed of Conveyance dated 2 September, 2003 and duly registered as No. 811/03 at page 129 of volume 565 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown. His land measures 0.1329 acre. Both Plaintiff and Defendant have a common vendor in the late Amadu Tarawally. The contention of the

Defendant is that the land sold to the Plaintiff by Mr Tarawally is separate and distinct from his.

2. Interlocutory proceedings were taken before HALLOWAY, J before the file was assigned to first, KONOYIMA, J on 10 November, 2009, and then to this Court on 14 October, 2010. The Plaintiff began giving evidence before me as PW1 on 4 April, 2011 and closed his case on 28 June, 2011 after calling another witness, a licensed surveyor, Mr Sundima. The Defendant finally opened his case on 15 November, 2011 and gave evidence on that day. On 8 December, 2011 he called as a witness, a document examiner, Mr Vincent, the purport of whose evidence was that there were certain discrepancies in the Plaintiff's survey plan which made it unlikely that it was authentic. He made no pronouncement on the finger print or purported finger print of Amadu Tarawally on both Deeds, which I find surprising as I shall shortly explain. At the end of Mr Vincent's evidence, Mr Edwards intimated the Court that he would wish to tender in evidence ~~the~~ HALLOWAY, J's notes of the cross-examination of the late Tarawally on an affidavit deposed to by him in the course of interlocutory proceedings before the Learned Judge. I requested Mr Edwards to provide the Court with authority for the request he had made, but he was unable to do so that day, and on several adjourned dates. In fact, he had to apply to the Court for leave to re-open the Court bundle as he wished to call as a witness, a licensed surveyor, Mr Sheriff Kargbo. This Application, after much delay, was finally made by Mr Edwards on 20 March, 2012 and I granted the same. After another interlude, partly because Mr Edwards was indisposed, Mr Kargbo finally gave evidence on 3 May, 2012. At the hearing on 14 May, 2012, Mr Edwards finally produced the authorities he said he had in support of the request he had made earlier this year. He produced photocopies of extracts from KEANE'S MODERN LAW OF EVIDENCE 6th Edition pages 21-27; photocopies of the Evidence (Documentary) Act, Chapter 26 of the Laws of Sierra Leone, 1960; and copies of pages 710 -715 of the 1999 White Book. As regards the portions highlighted by him in the extracts from the 1999 White Book, the notes in paragraph 38/10 are not relevant to these proceedings; the issue here is not whether the evidence sought to be tendered is a copy or not. As to paragraph 38/12 on page 712, Order 38

Rule 12 of the English Supreme Court Rules, 1999 is replicated in Order 30 Rule 3 of our own High Court Rules, 2007. But what it means is that evidence taken during the course of a trial may be used in any subsequent proceedings in the same cause or matter. That is clear enough. In other words, evidence taken down by this Court in this trial, may be used in subsequent proceedings brought by either side in the same cause. But the corollary is not that evidence taken in previous interlocutory proceedings will be automatically admissible at the trial of the action. As for the extracts from the work by Keane, Mr Edwards has not been kind enough to highlight the portions he wishes to rely on; rather he has in effect asked me to trawl through them, and to make of them what I wish. I have thus declined the implied invitation. As to the provisions of the Evidence (Documentary) Act, I quietly pointed out to Mr Edwards that Amadu Tarawally was, in the words of Section 3(3) of the Act, "a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." As such, Amadu Tarawally's statement could not be rendered admissible pursuant to the provisions of this Act.

3. In the interests of justice, I have done some research myself. At present, our Rules do not make express provision for the use of a witness statement when the witness who made the statement is not called to give evidence. There appears to be a lacuna in our Rules. But the cases cited in the English and Commonwealth Digest 2nd Re-issue, 1988 Volume 22(a) appear to suggest that an affidavit deposed and sworn to by a witness who is no longer available, may be tendered in evidence at a subsequent trial. I shall just recite some of the extracts from pages 373 & 374 of the Digest: " An affidavit which is upon the file of the Court may be used afterwards in the same cause, though for a different purpose, CHAMBERS v BRYANT (1843);.... Affidavits sworn in a previous stage of the cause may be used upon a subsequent application in the same cause HILMAN v CHITTY;..... In the absence of arrangement, affidavits used on a motion cannot be used at the hearing of the cause except by agreement between the parties, PERKINS v SLATER (1877);..... At the trial of a cause with viva voce evidence, the court admitted in evidence an affidavit filed upon an interlocutory motion which had been ordered to stand over to the

hearing, although the deponent was since deceased, and had not been cross-examined - ELIAS v GRIFFITH (1877).

4. My research brought me back to the proceedings before HALLOWAY, J. It appears that on 22 May, 2008 a Notice of Motion dated 19 May, 2008 came up for hearing before the Learned Judge. It was adjourned by consent of both Counsel, Messrs Bangura and Edwards. During the course of hearing into that same Application, Mr Bangura applied to cross-examine Amadu Tarawally on his affidavit filed in that Application. On 27 June, 2008 he was granted leave to do so. The pages of HALLOWAY, J's notes are unnumbered but his minutes for 27 June, 2008 read as follows: "M S Bangura Esq proceeds with cross-examination of the deponents of the affidavits in support of the Application sworn to on 19th May, 2008. Deponent SOK and xx of Amadu Tarawally: I do not know Ali Bangura the Plaintiff; I know the Defendant; I recall that my Solicitor called me at the office to sign a document. The contents of the document were read out and explained to me. I have never told the Solicitor that I am the common vendor to the Plaintiff and the Defendant. I never told my Solicitor that the Plaintiff's land was intact. C F Edwards re-examines the deponent aforesaid who says that he knows Amadu Salatt." It was Amadu Salatt I sold to." The Defendant was himself cross-examined on his affidavit. In answer during cross-examination by Mr Bangura, he said that he had never said in his affidavit that Amadu Tarawally is the common vendor of the Plaintiff and himself.
5. In his defence, the Defendant has made it clear that he is disputing the Plaintiff's claim that Amadu Tarawally sold land to him, i.e. the Plaintiff, which he, the Defendant was also laying claim to. As far as the Defendant is concerned, the land Amadu Tarawally may have sold to Defendant is located away from his. The contents of Amadu Tarawally's affidavit should not therefore take the Plaintiff or his Counsel by surprise. That he is not alive to be cross-examined will go to the weight to be attached to what he has deposed to in that affidavit, and not to its admissibility. An affidavit filed in Court, and on which the deponent has been cross-examined in Court, is quite superior to a witness statement which may have been composed in a Solicitor's chambers, and has not been tested in

cross-examination. I think it would be in the interests of justice that Amadu Tarawally's affidavit be admitted into evidence, and in the exercise of my discretion I so Order. At the end of the day, I shall have to decide what weight to attach to it, as he has not been subjected to cross-examination in this Court.

6. Mr Edwards is at liberty to tender in evidence through the Master and Registrar, the affidavit deposed and sworn to by the late Amadu Tarawally.



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

