Misc. App 154/2017 No.5

IN THE HIGH COURT OF SIERRA LEONE

General Civil Division

DR. AKIM GIBRIL - PLAINTIFF

Vs.

MRS JEANNE-MARIE LUCAS - DEFENDANT

Y. Williams for the Plaintiff
D. Taylor for the Defendant

RULING DELIVERED ON ……JUNE 2018

Reginald Sydney Fynn JA

Background

1. I have before me an application brought by Originating Summons filed on behalf of one Dr. Akim Gibril in which the primary order which he seeks among others is that the respondent be compelled to *"convey all that property situate at Lakka Freetown"* to him or in the alternative that the Master and Registrar be mandated to sign a conveyance in respect of the said property to him.
2. Before Mr. Williams of counsel for Dr Gibril could move the court Mr. Taylor appearing for the respondent Mrs Jeane Marie Lucas raised a preliminary objection, notice of which he proceeded to file formally to wit that *"… the present action is barred pursuant to the doctrine of res judicata"*. Mr Taylor's objection alleges that the action has been heard and determined with final judgment being handed down 3rd February 2014 by the Hon Mr. Justice M A Paul J.
3. Mr Taylor on 25th May 2017 filed a motion requesting this court to;

> *"strike out the Originating Summons dated 28th March 2017 the prayers therein and the affidavit deposed to by the Plaintiff/Applicant on the grounds that they are frivolous, vexatious and based on speculation pursuant to order 17 (1) (a)(b)(c) and (d) of the High Court Rules 2007 and or on the common principle of res judicata".*

4. It is the latter application, which, in is truth is but a preliminary objection to the substantive matter, that has now been argued and is considered in this ruling. The fate of whether the substantive application will be heard at being fully dependent on the outcome of this preliminary objection.
5. Supporting the objection is an affidavit by Drucil Evelyn Taylor dated 25th May 2017 and it has as exhibits the following:

a. DET 1 is a copy of the Originating Summons by which the substantive matter was commenced
b. DET 2 are the appearance and notice thereof entered by the defendants
c. DET 3 is the affidavit in opposition filled in the previous action
d. DET 4 is the previous Originating Summons
e. DET 5 is the drawn up judgement in the previous case started by DET 4
f. DET 6 and 7 are the Notice of Appeal in respect of the previous action and the change of solicitors respectively.

Counsel's Submissions

6. In his submissions to the court Taylor Esq argued that the concept of res judicata is universal and that it prohibits a party from re-litigating a matter that has been decided. He relied Treatises of the Law 5th Edition 1925 by Freeman. Citing the celebrated cases of Henderson vs. Henderson (1843) and Arnold vs. Westminister Bank PLC (1991) 2AC 93 (House of Lords) he stressed that where a part failed to raise an issue that could have been raised in a case he is thereafter estopped from raising that issue in subsequent litigation. He also referred to the difference between the two possible forms of issue estoppel. The former being where an issue was raised and decided and the latter being where an issue could have been raised but was not raised. He submitted that the authorities show that in both these circumstances the parties will be barred by the doctrine of res judicata to subsequently in another trial re-litigate either of such issues- ie to say neither the raised and decided nor that which they failed to raise but could have been raised.
7. Taylor Esq submitted further that public policy demands that there should be closure to litigation and that the doctrine of res judicata aids this policy. He referred the court to Yulval Sinai's article – "*Reconsidering Res Judicata; A comparative Perspective".* These same parties have come to court and they had litigation and decision. The issues now being raised could have been raised then but they were not. They cannot now be raised in the present process especially when there is an appeal pending against the previous decision.
8. In answer to the preliminary objection Williams Esq for the plaintiff/respondent argued that the issues before the court in the present action are different from those previously litigated. He invited the court to compare the judgement in the previous case and the orders prayed for in the present application. He submits that the issues are separate and distinct. He argues that the matters which are being raised now have not been decided at all. The previous matter turned on whether an agency survived the demise of the donor/principal. That issue he argued is not raised at all in the present application which seeks to compel the personal representative/administratrix to complete the lawful contract of the deceased intestate.
9. Williams argues further that the issues raised in the present action could not have been raised in the previous matter as the process by which it was tried does not lend itself to a counter claim. He referred the court to Fisher vs Fisher and Thoday vs.

Thoday arguing that res judicata does not prevent a party from raising and issue as has been done in this case.

10. On his second bite Taylor Esq submitted that the cases cited by Williams are both divorce cases and ought not to apply in the present circumstances. He argued that a counter motion in the previous case could have brought these issues before the court for its consideration. He urged that this issue was not a fresh and emerging issue as the parties knew about whilst the previous case was heard and that it could have been decided then.
11. It seems Taylor Esq abandoned the aspects of his objection which allege that the substantive application is frivolous and vexatious. His arguments have all turned on the principle of res judicata- issue estoppel and that is the only issue that I will deal with in this ruling.

The Doctrine of Res Judicata; Issue Estoppel

12. Res Judicata it cannot be denied is a doctrine recognised in the Sierra Leone jurisdiction. Hamilton JA (as he then was) in Amal Toufic Huballah vs. Abdulai Sow acknowledged this and said:

> *"…the plea of res judicata is never a technical plea. It is part of our received law by which a final judgment rendered by a competent judicial tribunal with the necessary judicial competent on the merits is conclusive as to the legal rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same cause of action."*

13. In Horse Import and Export Company Limited vs The Inspector General (CC261/11 H N. 6)N C Browne-Marke JA (as he then was), took the view that it is an abuse of process to attempt to re-litigate an issue that could have been raised and decided in a previous action. Quoting the White Book he said *"It is an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings ……even though a plea of res judicata might not strictly be the answer to the action; it is enough if substantially the same point has been decided in prior proceedings"*.
14. The doctrine of res judicata is however not absolute in its application and does admit to exceptions in all its forms. Those exceptions were mentioned in Henderson itself.

> *"Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under **special circumstances)** permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was hot.....only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in **special cases,** not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly*

belonged to the subject of litigation, and which the parties, exercising-reasonable diligence, might have brought forward at the time.

15. Quoting the above passage in Cummings-John vs Cummings-John (Civ App. 33/2007) E. Eku Roberts JA (as he then was) concluded that there were exceptions to the application of res judicata. In those situations res judicata will not apply. In that case, having stated that it disclosed a special circumstance the honourable Judge went on to rule that *"…issue estoppel does not apply to bar the Judge (any Judge) from setting aside her order*" (parenthesis mine).
16. Apart from the fact that exceptions are possible for special circumstances it has been recognised and accepted that res judicata strictly applied sometimes results in injustice. This passage in the Arnold case points at this issue; *"One of the purposes of estoppel being to work justice between the parties it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result…."*
17. Yuval Sinai's article compares the use of res judicata across jurisdictions and judicial cultures. It invites the thought that res judicata strictly applied does not always achieve a just outcome. Maybe the most poignant testimony of this invitation is the quotation that the article begins with and which could be taken as setting its scope; *"Res Judicata changes white to black and black to white, it makes the crooked straight and the straight crooked"*. The article sets out the law of res judicata in its strict and general state but controversially comments also *"Thus, because RJ is a drastic measure it should be applied only in clear cases when a matter has been specifically litigated and a litigant has had his actual day in court. It ought not to be extended to matters that could or should have been raised and litigated in the first action".*

The Present Case- was it litigated before?

18. Has the present case been litigated before? Could the issue now raised have been raised and decided in the previous matter? Does the present situation present special circumstances which make res judicata undesirable? These are the questions which come up for consideration now. I will answer them in the order they have been listed.
19. There was a case before my brother M A Paul J. That case was between the same parties but this, in itself is not a bar. The same parties can come to court over and over again as long as each time they come they come to court about some new issue. A different dispute. When these parties came before Justice Paul it was the present defendant Mrs. Lucas who had brought Dr. Akim Gibrill and the Administrator and Registrar General. In that action Mrs Lucas posed three specific questions to the court and asked for certain action to be taken based on the outcome of those questions.
20. Mrs Lucas wanted to know whether the agent of a deceased person could have transferred title to land after the demise of the principal. If the court agreed with her that the agency does not survive then she was asking the court for the conveyance

made by the agent to be set aside. She was successful the court answered the questions in her favour and granted her requests.

21. I have read the drawn up order from the previous action. I have also read the hand written notes of the learned and honourable Judge, this is Exhibit A in the affidavit of Abdul Karim Koroma sworn to on 13th June 2017. In his ruling the Learned Judge recounts the failure of counsel to appear and his efforts by way of awarding costs against absent counsel trying to compel his attendance but to no avail. In the end the learned Judge ruled on the application before him not having heard the arguments on both sides he answered the questions asked relying on the papers filed.
22. In the whole of the learned Judge's judgement there is no discussion of the contract for the sale of the land which is alleged in the papers before me let alone a mention of whether consideration was given as alleged and if so in what circumstances. I cannot in good conscience say that the issue which is now before me has been heard before at all. However the more crucial question is whether it could have been raised and decided therein.

Could this issue have been raised previously?

23. Williams Esq's argument is that the process employed to bring the matter to court in the previous case does not admit to a counter claim. He argues that the LTJ could not have in the circumstances had the opportunity to decide the matters which are now raised in this matter *i.e.* to say whether the Administratrix of an Estate should not be compelled to sign a conveyance in respect of a contract for the sale of land entered into by the Agent of that deceased prior to his demise.

24. Taylor Esq argues that a counter motion could have been filed, this certainly would have been novel. Whilst it is common to hear of counter motions in the board room they are not such a common feature in the court room. Any counter motion would have entailed a fresh filing and the possible invoking of specific rules with prayers for a separate outcome distinct from those which were prayed for in the initiating process. The process in the previous action did not seem to readily admit this. Clearly the defendant in the previous matter was in a quandary.

25. Whilst a counter motion may have been an unfamiliar process (no rule provides for it nor is it expressly prohibited) an affidavit-in-opposition certainly was an available vehicle. In fact it is the well-established practice by which a process such as the one employed is answered. I have read the affidavit of Maureen Idowu in support of the previous action which was commenced by Originating Summons. That affidavit does condescend to sufficient particulars which to my mind opened a door through which a well-crafted affidavit-in-opposition could have raised the present issues for the Judge's consideration, alas no such affidavit-in-opposition was filed.

26. In my opinion it is the failure to file an affidavit in opposition which far more than the nature of the initiating process that deprived the court in the previous case from hearing the present issues. It seems to me that the issues now before me could have in fact been raised directly or indirectly in the previous matter. Whether the Judge would have been in a position to decide them, him having to deal with specific

questions subject matter of that application, would have been a completely different issue.

27. Having found that the parties to the previous matter are the same as are before me and that though the issue now raised was not decided in the previous matter it could have been so raised, one last issue needs to be decided before res judicata can be applied in the present case and that is whether the circumstances of the case are special enough to prevent its application.

Special Circumstances

28. Previously it was thought that the special circumstances which will prevent the application of issue estoppel must necessarily include the emergence of fresh material which could not have been discovered with due diligence during the previous trial. The following passage from the Arnorld case puts that thought to rest and I will be guided by it: *"....there is no definition of special circumstances in the authorities but special circumstances are not limited to new matters of evidence…..there should be no arbitrary limit to special circumstances"*

29. In the submissions before me the applicant has made it clear that he is not in disagreement with the decision in the previous case. Though there was an appeal filed, after change of counsel the present indication is that that course of action is to be abandoned. Justice Paul was completely correct in his assessment of the question of law which was before him and both the parties agree on that. However the determination of that legal question alone has not and cannot decide the substantial issues between the parties, which issues include many facts and law which remain undecided.

30. Peculiarly this case as presented will not in any way whatsoever change the pronouncements made in the previous case. In fact it would appear that the present case is a call for one of the orders in the previous case to be obeyed fully. The Hon Justice Paul had ordered that: *"the property be returned in its entirety to the Estate of Oswald Bennett Lucas* ***and be administered by the Administratrix*** *of that Estate" (emphasis mine).* The present action may be viewed as a call on the administratrix to obey that order and so cannot in that sense be a reopening of the previous matter at all. It is my opinion in all the circumstances of this case that the answer to that call cannot simply be estoppel, the answer must necessarily go to the merit of the claim. The claim on the estate should justly be defeated on its lack of merit.

31. I have already stated that the issues now before me could have been raised in an affidavit in opposition but it needs be mentioned that the answers to the questions raised in the previous action could not have been any but those already given. The Judge in the previous matter would not have had room (except strenuously) to find otherwise than he indeed found. Even if the issues had been raised and the Judge had found any merit in them (and I do not here suggest they do have or have not any merit) the Judge in the previous matter would have had to be significantly ingenious

to embrace such merits or demerits within the scope of the answers which were required of him.

32. These recently discussed issues taken together are in my opinion provide sufficient special circumstances for the purposes of the non-application of issue estoppel.

Conclusion

33. It is my opinion that the parties have not actually had their day in court on the real issue in dispute between them. It is a substantial issue relating to the purported sale of a piece of land and subsequently true ownership of the same. This issue has not been raised nor has it been decided by any competent adjudicating authority. In my opinion, justice will only be truly served between the parties when this issue is adjudicated.

34. Additionally, I am satisfied that there are special circumstances (discussed above) which make the application of res judicata issue estoppel undesirable in this case. This is an outcome consistent with the thought that *"…….in modern times it has been recognised that there may be circumstances where the doctrine could apply but it would be unjust to apply it".*(Arnold vs Nat West Bank PLC*)*

35. I must add that I have not found in the several divorce matters cited in support of the non-application of issue estoppel any reason to conclude that the principles in them are limited to divorce cases only. My ruling therefore is that:

The preliminary objection is overruled. Costs in the cause.

……*Reginald Sydney Fynn JA*