

IN THE HIGH COURT OF SIERRA LEONE
FAST TRACK COMMERCIAL COURT DIVISION

BETWEEN:

ZARIA AMINA MARA
17 B Hill Cut Road
Freetown

- PLAINTIFF/APPLICANT

AND

THE MANAGING DIRECTOR
STANDARD CHARTERED BANK
LIGHTFOOT BOSTON STREET
FREETOWN

- 1ST DEFENDANT/RESPONDENT

FREETOWN NOMINEES LIMITED
(AS COMPANY SECRETARY OF STANDARD
CHARTERED BANK)
71 SIR SAMUEL LEWIS ROAD
FREETOWN

- 2ND DEFENDANT/RESPONDENT

STANDARD CHARTERED BANK (SL) LTD
LIGHTFOOT BOSTON STREET
FREETOWN

- 3RD DEFENDANT/RESPONDENT

DANIEL A. SERRY
MANAGING DIRECTOR
FIRST DISCOUNT HOUSE
19 WALPOLE STREET
FREETOWN

- THIRD PARTY 1 /RESPONDENT

FIRST DISCOUNT HOUSE LTD
19 WALPOLE STREET
FREETOWN.

- THIRD PARTY 2 / RESPONDENT

Counsel:

I. I. Mansary Esq for the Plaintiff/Applicant
R. Johnson Esq " " 1st and 3rd Defendants/Respondent
A. C. Thompson Esq " " 2nd Defendant/Respondent
C. Macauley Esq " " Third Party 1
I. Jalloh (Ms) " " Third Party 2

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RULING DELIVERED THIS 11th DAY OF JULY 2019

- A. On the 27th of June 2019 Counsel for the Plaintiff/Applicant was about to move the Court in respect of a Notice of Motion dated 16th May 2019 seeking the following Orders:
1. that an Order be granted that the following questions posed below are suitable for determining this matter without a full trial of the action:
 - (a) whether the Plaintiff is entitled to all the unpaid dividends from 2014 until date of judgment by the 3rd Defendant?
 - (b) Whether:
 - i. the share certificate numbered 00082888 evidencing the Plaintiff's ownership of 20, 012, 789 shares in the 3rd Defendant bank is valid in law?
 - ii. the 3rd Defendant is stopped from denying the validity of the share certificate numbered 00082888; and
 - iii. whether the Plaintiff is entitled to compensation for the loss suffered by her as a result of her reliance on the said share certificate issued by the 3rd Defendant?
 2. That if the answers to the questions above are in the affirmative that judgment be granted in favour of the Plaintiff herein pursuant to the claims indorsed in the Writ of Summons dated 21st September 2018, pursuant to Order 17 of the High Court Rules 2007.
 3. In the alternative, that Summary Judgment be granted by the court on the basis that the 3rd Defendant does not have a Defence to the claim of the Plaintiff, pursuant to Order 16 Rule 1 of the High Court Rules 2007.
 4. Any further Order (s) that the court may deem fit and just in the circumstances.
 5. Costs.
- B. The application was supported by the Affidavit of Zaria Amina Mara sworn to on the 16th day of May 2019 together with several exhibits attached thereto.
- C. Following the said Notice of Motion, Counsel for the 1st and 3rd Defendant/Respondent, Mr. Ransford Johnson, filed an affidavit in

opposition on the 22nd of May 2019. Thereafter, on the 23rd of May 2019 Counsel for the 2nd Defendant/Respondent, Mr. Anrite Columbus Thompson, also filed an affidavit in opposition.

- D. On the 27th of June 2019, Counsel for the 1st and 3rd Defendants/Respondents raised a preliminary objection to the said motion of 16th May 2019 in addition to his affidavit in opposition aforesaid. He argued that the manner in which Counsel for the Plaintiff/Applicant has approached the court, for the reliefs on the face of the motion violates the mandatory provisions of the High Court Rules of 2007. He submitted that the first two principal reliefs prayed for can only be brought by Judge's Summons and not by Notice of Motion. He pointed out that Order 16 Rule 2 (1) of the High Court Rules of 2007 is quite clear on it. Mr. Johnson maintained that he was making his preliminary objection to the motion, even though he had filed an affidavit in opposition; since his objection goes to jurisdiction.
- E. Mr. Mansaray, Counsel for the Plaintiff/Applicant replied that the primary relief sought in his application is made pursuant to Order 17 of the High Court Rules of 2007; which deals with disposal on points of law. Whilst the application for summary judgment, made pursuant to Order 16 of the said Rules is secondary to the application for disposal on a point of law. He argued that the application by notice of motion was appropriately filed and had rightfully invoked the jurisdiction of the court.
- F. He further submitted that the application made by Mr. Johnson only relates to non-compliance with the rules, particularly Order 16 rule 2 (1) of the High Court Rules of 2007; and that the objections do not touch and concern the powers of the court to hear and determine the issues raised in the motion filed and the affidavits filed by Mr. Johnson. He therefore argued, that it was a mere irregularity and that it should not nullify the proceedings; Order 2 of the High Court Rules of 2007.
- G. Additionally, Mr. Mansaray argued that the filing of an affidavit in opposition by Counsel for the 1st and 3rd Defendants was a fresh step; which consequently waived the alleged irregularity.
- H. In reply, Mr. Johnson disagreed with the distinction drawn by Mr. Mansaray as to which relief prayed for was primary and secondary. He

maintained that both reliefs carry equal force and that Counsel for the Plaintiff/Applicant should have made that distinction in his Motion. Mr. Johnson conceded that the court does not have the power to cure an irregularity; but that, the irregularity was not an ordinary one rather a fundamental one; in which, if the court were to hold that the application could succeed in its present form and manner, the procedural law relating to summary judgment applications will change. That this will therefore mean that, any applicant could apply for summary judgment in any other manner.

- I. Mr. Johnson argued that his objection goes to jurisdiction; and that he could not emphasise more on Order 16 rule 2 (1) of the High Court Rules of 2007. He submitted that the manner and form of application made to the Court was a procedural nullity and that Mr. Mansaray should reconsider the method of application he has employed.

Analysis and Decision

- J. I have closely examined the said Notice of Motion and the Affidavits in Opposition filed by Mr. Anrite Thompson, Counsel for the 2nd Defendant/Respondent and that filed by Mr. Johnson, Counsel for the 1st and 3rd Defendants. I have also considered the preliminary objection made by Mr. Johnson on the 27th day of June 2019 to the manner and form in which Mr. Mansaray had approached the Court. That is, that he had filed a notice of motion to seek a summary judgment under Order 16 Rule 1 of the High Court Rules of 2007, when he should have approached the Court by filing a summons as prescribed by Order 16 Rule 2 (1) of the High Court Rules of 2007.
- K. The first question that arises is this: did Counsel for the Plaintiff/Applicant seek a summary judgment under Order 16 Rule 1 (supra)? If the answer is in the affirmative, did he use the correct procedure? In my opinion, the answer is yes; the relief prayed for is one of a summary judgment of the questions posed in 1 (a) and 1(b) of the said Notice of Motion. In other words, the applicant has asked the court to firstly, determine the questions posed in the said Notice of Motion of 16th May 2019 without a full trial; under Order 16 Rule 1(1) of the High Court Rules of 2007; even though the

said Application/Notice of Motion states that it is made pursuant to Order 17 of the High Court Rules of 2007.

- L. So what does Order 16 Rule 1(1) of the High Court Rules of 2007 say? It says that *"where in an action to which this rule applies a defendant has been served with a statement of claim and has entered appearance, the plaintiff may, on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of the claim except as to the amount of any damages claimed."*

- M. As to the procedure to use, what does Order 16 Rule 2 (1) of the said High Court Rules prescribe? Order 16 Rule 2 (1) of the High Court Rules of 2007 says that *"an application under rule 1 **SHALL** be made by summons supported by an affidavit verifying the facts on which the claim or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed."*

- N. From the above stated law, Mr. Mansaray did not follow the procedure as laid down by Order 16 Rule 2 (1) of the said rules. In his submissions to the Court, Counsel for the Plaintiff/Applicant, Mr. Mansaray, said that not applying by summons was a mere irregularity that ought not to nullify the proceedings. He said that the first relief prayed for was secondary to the second relief; which asked the Court for a determination on points of law. Also, Mr. Mansaray argued that Counsel for the 1st and 3rd Defendants, Mr. Johnson, waived the irregularity by filing an affidavit in opposition. The filing of the affidavit in opposition, he claimed amounted to a fresh step after becoming aware of the irregularity.

- O. It is the Court's considered opinion, that Mr. Mansaray wanted the Court to consider the questions posed to be determined summarily and he was wrong to make his application by notice of motion. This is because an application under Order 16 Rule 1 is by summons and it is mandatory. Also, he should have taken note of the fact that the facts and issues of the case are contentious. To deal with contentious and complex issues, you

will need to come by writ of summons; as per Justice Rhodes-Vivour JSC, Aiah Momoh v Sahr Samuel Nyandemoh, SC. CIV. APP. 6/2006 at 1-16.

- P. Furthermore, the affidavits in opposition and the third party notices speak for themselves and they speak volumes. There are clearly disputes that will need to be resolved; and with this type of background, no reasonable court would want to determine such fundamental triable issues summarily; Aiah Momoh v Sahr Samuel Nyandemoh, SC. CIV. App. 6/2006 at p 1-16. The writ of summons procedure is clearly the most appropriate method to employ. Had it not been for the disputable issues involved, one may have considered the irregularity as one that could not nullify the proceedings.
- Q. The second question that arises is: whether the court needs to consider the points of law at this stage, given the glaring complexity of facts that confronts it? Order 17 Rule 1 (1) of the High Court Rules of 2007 states that "the Court **MAY** on the application of a party or its own motion determine any question of law or constructionat any stage of the proceedings where it appears to the Court that- (a) the question is suitable for determination without a full trial of the action; and (b) the determination will finally determine subject only to any possible appeal, the entire cause or matter or any claim or issue in the cause or matter.
- R. The Court is of the view that, it is not so much the law as to the facts of the case. It does not think that the questions posed in the said Notice of Motion are suitable for determination without a full trial of the action. Also, the Court does not think that any determination at this stage of the proceedings, will finally determine the entire cause or matter or any claim or issue in the cause or matter. If for anything, a determination at this stage will only trigger an appeal and which will be justifiable. Where a clear -cut issue of law is raised by way of defence in an application for summary judgment, the court should decide it immediately; Sime, S. 'A Practical Approach to Civil Procedure' [2nd edition, 1995], Blackstone Publishers at 164.
- S. However, it is quite a different matter, if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the Plaintiff's claim or of some of those issues, is of such a character as would not justify


its being determined as a preliminary point, because little or no savings in costs would ensue. It is an, a fortiori case, if one answer to the question of law is any way dependent upon undecided issues of fact; per Lord Donaldson of Lynton M R in: R. G. Carter Ltd v Clarke [1990] 1 WLR 578. In: Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (UK) Ltd [1990] 1 WLR 153 CA, where the Court took the view that leave to defend should also be given, where the point requires a protracted argument.

- T. Additionally, I do not think that the Plaintiff/Applicant can truly say that there is no defence given what I have stated above. Where inferences of negligence and breach of duty have been made, such cases invariably involve disputed factual issues; and it will be rare for a plaintiff to be able to swear that there is no defence; Sime, S (supra) at p 164. The Order 16 method is therefore limited to special cases where there is no disputed fact; and as such, Order 16 Rule 1 and Order 17 Rule 1 of the High Court Rules of 2007 are not applicable.
- U. Mr. Justice Rhodes - Vivour in Aiah Momoh v Sahr Samuel Nyandemoh (supra) held that, a trial judge had no jurisdiction to hear by originating summons [and in the same vein, I will say 'notice of motion'] what should be heard by writ of summons and pleadings. He said that, once a trial judge finds that there are disputes on facts in the affidavits, he has no option but to Order pleadings.
- V. On the issue of a mere irregularity and waiver, Mr. Justice Rhodes - Vivour (supra) made a distinction between a mandatory provision as in Order 16 of the High Court Rules of 2007 which cannot be waived and a mere procedural requirement in the course of a trial which can be waived. See also: Smythe v Wiles 1921 2 KB p66; Papadoponios v Papadoponios [1929-1931] Probate Division at p 55 where parties cannot by consent confer jurisdiction upon a tribunal, which by law has no such jurisdiction.

CONCLUSION

- W. In conclusion and in view of the above stated, the application made for and on behalf of the Plaintiff/Applicant is hereby Dismissed. The following Orders are hereby made:

1. Trial shall proceed afresh by Writ of Summons.
2. Costs in the cause.

Signed: 
Hon. Lady Justice F. Bintu Alhadi J.

Date: 11th July 2019