C.C 45/10 2019 C. N0. 4

IN THE HIGH COURT OF SIERRA LEONE

LAND AND PROPERTY DIVISION

Between:

Arnold Carrol

A Beneficiary under the Estate - Plaintiff

Of Mr. Melbourne Arnold Carrol

(Deceased Intestate)

N0. 17 Heddle Street, Hastings

And

Mr. Francis Emmanuel Bannet - 1st Defendant

N0. 21 Wesley Street

Hastings

The Director of Surveys and Lands - 2nd Defendant

Ministry of Lands, Country Planning &

The Environment, Youyi Building,

Brookfields

The Administrator and Registrar General - 3rd Defendant

Roxy Building, Walpole Street, Freetown

Counsels: K. Thorley, Esq. for the Plaintiff

E. T. Koroma, Esq., for the Defendant.

Ruling on Applications on Notices of Intention to Cross Examine Affiants to Affidavits and for this Action to be Struck Out for Non-Compliance with Subsection (1) of Section 3 of the State Proceedings Act N0. 14 of 2000, Delivered by the Hon. Dr. Justice Abou Binneh-Kamara, on Friday, 12th February, 2021.

1.0 Introduction.

This ruling is consequent on three applications made by both Counsels for the Plaintiff and Defendant, G. K. Thorley Esq. and E. T. Koroma Esq. Thus, the latter Counsel, on 11th April, 2019, filed the first notice of intention to cross examine, Mr. Patrick Turay and Mr. Arnold Carrol, the deponents to the affidavits of 5th February, 2019 and 11th March, 2019, on the allegedly contentious and misleading facts that underpin their depositions. Thus, the said affidavits are accordingly attached to the notice of motion, dated 11th March, 2019, praying for a number of specific orders, including declaration of title to the property, for which the action is originally instituted, cancellation of a subsisting property survey plan and a conveyance, allegedly concerning the same realty, incisively described in the writ of summons and particulars of claim, assessment of damages and perpetual injunction. The second notice of intention to cross examine was filed by G. k. Thorley Esq., on the 14th may, 2019, because he is of the conviction that some of the facts, which the affiant to that affidavit (Counsel for the Defendant: E. T. Koroma Esq.)

deponed to, are contentious and erroneous and frivolous. So, he would want to ascertain their veracity. Nonetheless, on 22nd May, 2019, without filing any notice of motion, E.T. Koroma Esq. applied for the action to be dismissed or struck out for non-compliance of Subsection (1) of section 3 of the State Proceedings Act N0. 14 of 2000 (hereinafter referred to as Act N0. 14 of 2000). However, I will first deal with both notices of intention to cross examine the affiants to the aforementioned affidavits in tandem with the position of the law in our jurisdiction. Secondly, I will examine the legality of the application to dismiss or strike out this action, for non-compliance, with the aforesaid provision in Act N0. 14 of 2000. Thirdly and finally, I will accordingly determine all three applications, which have somewhat delayed the progression of this matter.

1.1The Notices of Intention to Cross-Examine the Affiants.

The facts in issue that are to be determined revolve around both the substantive and adjectival law. The substantive law creates rights and obligations. And adjectival law, which does not create rights and obligations, is the mechanism (rules of evidence and procedure), pursuant to which rights and obligations are enforced. Nonetheless, concerning the notices of intention to cross-examine, I will rely on the adjectival law (rules of evidence and procedure of our jurisdiction), to

discern them. The issues are evidential, because they generically relate to affidavits. And the centrality of the relevance and admissibility of affidavit evidence in civil proceedings cannot be overemphasized. Again, the issues are also procedural, because they concern whether there is a rule of procedure, preventing the court, from getting deponents to be cross-examined on facts deponed to, when the other side has refused or failed to file an affidavit in opposition, to the very affidavits, which contents are being challenged. Evidentially, every fact which is relevant to any other fact in issue is relevant and therefore admissible. However, notwithstanding its admissibility, the weight which a reasonable and credible tribunal of facts attaches to it, is what is much more important.

Meanwhile, the nature of civil litigations, requires much evidence to be adduced via affidavits. The complexities of civil litigations, inter alia, require the filing of a plethora of pre-trial motions, bolstered by the requisite affidavits, by both sides. In such circumstances, the courts will never be able to expeditiously and judiciously determine, such pre-trial motions, if they are not equipped with the apposite evidence, deponed to in such affidavits. Thus, because such applications are made before the commencement of the trials, it would be legally and even rationally expedient, to call witnesses to come testify on oaths. So, the facts that they deposed to, in their requisite affidavits, are of very serious evidential value. In tandem with the constitutional principle of 'audi

alteram partem' {see section 23 (2) of the 1991 Constitution of Sierra Leone}, the courts will never grant the reliefs prayed for without allowing the other side to present their case. This is the essence of filing affidavits in oppositions in circumstances, wherein the applications are made inter parte; but this is not the case in circumstances, wherein the courts are obliged to deal with ex parte applications.

Alas! Even when it comes to ex parte applications, the applicants are obliged to make full and frank disclosures of the undiluted facts that inevitably necessitate the applications to the courts, in order for them to be able to make fair, just and reasonable judgements, on such applications, which urgency must not (under any circumstances) be self-induced. This is how the courts as arbiters of justice, have been able to hold the scales balanced, and maintain their neutrality, integrity, credibility and independence, in the determination of particularly, the plethora of pre-trial motions that they normally rule on, on a daily basis.

Essentially, on the evidential significance to cross-examine deponents to affidavits, The Court of Appeal of British Columbia held in **Brown v. Garrison (1969) W.W. R. 248 at 205:**

> '... that the discretion of this court in allowing cross-examinations on affidavit, must be exercised on proper

principle and in the normal course will be ordered where the affidavit contains facts that are in issue.'

Significantly, the aforementioned affidavits which are in contention, indubitably contain a plethora of facts that are cognate with the facts in issue of this matter. Therefore, pursuant to this criterion alone, This Honourable Court will be tempted to dismiss the contentions and order that the deponents to the affidavits of the aforesaid dates, be accordingly cross-examined. However, any attempt to determine the contentions from the standpoint of their evidential significance alone, will be guilty of a naïve legal miscalculation.

Procedurally, Order 31 of the High court Rules, 2007, exclusively deals with affidavits. Thus, it appears that there is nothing in Order 31 that can be of help to this tribunal of facts in resolving the issues in which the contentions are clothed. Nevertheless, the decided case referenced above {Brown v. Garrison (op. cit)}, further alludes to another procedural issue that is crucial in the determination of whether a court of competent jurisdiction will grant or refuse to grant an application that calls for deponents to be cross-examined, on the contents of their affidavits. Thus, it was also held:

'... in keeping with the exercise of discretion, there is also the general rule that a party must file its affidavit, before he/she can cross-examine a deponent on the opposing side.'

This principle was also religiously followed in **Peterson v. Hodges (1914) B. C. R. 598 at 602, 601 (B. C.C.A)**. The Supreme Court of British Columbia inter alia held in **Royal Bank of Canada v. Larry Micheal Jones, 2000 BCSC 520 (CanLII),** that:

'The Plaintiff... swore to her affidavit in support of the 1995 Summary Trial application, which was filed and delivered to the Defendant on December, 8, 1995. Thus, the Defendant had been in possession of that affidavit for approximately four years; he could have consulted with different law firms that would have addressed on whether or not to cross-examine, or another representative, failing her availability'.

Meanwhile, in effect, the Supreme Court of British Columbia, upheld the Court of Appeals decision in the foregoing cases; and emphasized the significance of the principle that even the application to cross-examine, has to be made within a reasonable period, for it to be entertained by any court of competent jurisdiction. Nonetheless, the position of the Supreme Court of British Columbia, on the need to file an opposing affidavit to a subsisting affidavit in support, before service of the notice

of intention to cross examine, is in accordance with the provisions of Sierra Leone's repealed High Court Rules of 1960. Moreover, the Rules of Court Committee, advertently or inadvertently, expurgated the foregoing provision, which was neatly embedded in the 1960 rules, in developing and shaping the procedures, culminating in the High Court Rules, 2007.

Thus, there is now a lacunar in this area of Sierra Leone's adjectival law. Indeed, there is no provision in the High Court Rules of 2007, regulating the very issue upon which the contentions, which are to be determined are predicated. So, in the circumstances, it appears that the issues, which are to be determined, regarding the need to cross-examine the deponents to the aforementioned affidavits, are subject to the unfettered discretion of this Bench. Nonetheless, this Bench is minded and inclined, to give credence to the position, articulated in the decided cases, referenced above.

Therefore, since the Defendant's Counsel (E.T. Koroma Esq.) has not filed any affidavit in opposition to the two affidavits, which he says contain statements that are as preposterous as they are pretentious, I will order that the said counsel ought to have filed two affidavits in opposition to the affidavits in support of the motion, dated 11th May, 2019, before filing the notice of intention to cross examine, dated 22nd May, 2019.

Thus, I will caution, in the interest of fairness and justice, that the application to cross-examine the aforementioned deponents, is permitted by This Honourable Court, subject to the filing of the requisite affidavits in opposition. Regarding G.K. Thorley's notice of intention to cross examine, I will caution that he seeks leave of This Honourable Court, to file another notice of intention to cross-examine, because the date of the affidavit which he referenced, is different from that which is in attached to E.T. Koroma's notice of motion, dated 2nd May, 2019.

1.2 <u>The Ramification of Non-Compliance with Section 3 (1) of Act N0.14 of 2000.</u>

The argument of E.T. Koroma Esq. on this point is simple and straightforward. The writ of summons contain the names of both the Administrator and Registrar General and the Director of Surveys and Lands. Since both officials are in two distinctively different state institutions, the Attorney General and Minister of Justice, ought to have been accordingly served with the requisite processes, about this action three months before its commencement, pursuant to section 3 (1) of Act N0.14 of 2000. Counsel alluded to this court's ruling in **Media One Centre v. Electricity Distribution and Supply Authority (EDSA) (C.C 33/2018) Ruling Delivered on 22nd November, 2018)**, in justification of his submission and posited that this action should be dismissed with cost.

However, I do not agree with this submission. Section 3(1) of Act N0. 14 of 2000, does not apply. The inclusion of the names of the aforementioned officers in the writ of summons and statements of claim, does not presuppose that the Attorney-General and Minister of Justice has to be served with the apposite three (3) months' notice; espoused in section 3 (1) of the said statute. Section 3 (1) is applicable to every situation in which an action is directly brought against a state institution; as in the **Media One case (op. cit)**, which Counsel referenced.

This case is brought against the 1st Defendant; and the orders prayed for are exclusively directed against the 1st Defendant. The inclusion of the names of the aforementioned officers in the writ of summons, does not presuppose that whatever orders that this court pronounces will affect them. What about actions that are brought for the registration of registrable instruments out of time, pursuant to section 2 of Act N0. 6 of 1964? Why it is that such actions are always brought against the Registrar General (as a Defendant), but notices are not always sent to the Attorney-General and Minister of Justice in compliance with the said subsection (1) of section3?

Furthermore, the application to dismiss the action was orally made. One would have thought that such a serious application, should have been made by a notice of motion, bolstered by the requisite affidavit. Again,

the best thing counsel should have done, was to have filed a motion requesting this Bench to stay the proceedings for the reason stated above; and not to ask for it to be dismissed. Even if he had filed a motion for a stay of proceedings, the order would not have been granted for the same articulated reason aforementioned. Against this backdrop, I will thus dismiss the application. And I make no order as to cost.

12/2/2021

The Hon. Dr. Justice Abou Binneh-Kamara,

Justice of the Superior Court of Judicature of

Sierra Leone.