

CC/2019 2019 S. 13

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Mustapha Maju ---

Defendants/ Applicants

Madam Rugiatu Kamara

Mammy Haja

Mrs. Ragiatu Kabba (Added by Court Order

Dated 16th February, 2021)

All of Jama Town

Diversion

Newton

And

Mr. Mustapha Sesay ---

Plaintiff/Respondent

(Suing as the Administrator of the Estate of

Alhaji Foday Sheik Kabirr Sesay)

5 Upper Bombay Street

Freetown

Counsel:

Tamba Kelly Esq. for the Defendants/Applicants

Elvis Kargbo for the Plaintiff/Respondent

Ruling on a Preliminary Objection Delivered by The Hon. Dr. Justice Abou B. M. Binneh-Kamara on Tuesday, 15th March, 2022.

1.1 The Application and the Objection Thereto.

Tamba Kelly Esq. of Garber and Co. of N0.49 Walpole Street, Freetown, filed a Notice of Motion, dated 10th June 2021 for the default judgment of this Honourable Court, dated 10th July 2019 to be set aside, injunction and for Rugiatu Kabba, who is added as a Defendant to this action (by virtue of this Honourable Court's Order, dated 16th February, 2021), to be restored, after the execution of the said default judgment. The foregoing application appears to have been supported by the eleven (11) paragraphs affidavit of the said Rugiatu Kabba, sworn to and dated 10th June, 2021. The said Notice of Motion came up for hearing on the 25th June, 2021. Meanwhile, as it was being moved, Elvis Kargbo Esq. of Betts and Berewa Chambers, raised five (5) objections to the contents of the Notice of Motion; and dubbed those objections as preliminary and fundamental to whether this Honourable Court, should entertain the very application that was being moved. He nonetheless, predicated the objections on the following grounds:

1. The papers filed do not show who is the Applicant and who is the Respondent. It also does not show who is the Plaintiff and the Defendants in this action.
2. Counsel invites the Court to examine and scrutinize the papers as filed. He further invites the Court to look at the title of the application; it describes Mustapha Sesay as the 'Respondent/Plaintiff'. Counsel says this description is wrong because the action was never instituted in the Magistrate's Court; and they are not from that court, in response to an application in the High Court of Justice.
3. Counsel also tells the Court that the description of the 'Applicant/Defendant' is wrong. He alludes to two (2) and concludes on this point that the descriptions of the parties to this application are completely wrong.
4. There is nothing on the face of the Notice of Motion, referring to the affidavit, supporting the application.
5. **The form of the application is wrong is wrong in its entirety; and should therefore be thrown out with substantial cost.**

However, on 22nd July 2021, Tamba Kelly Esq. in response to the aforementioned objections, made the following submissions:

1. The foregoing objections are unfounded and vicious and thus have no foundation in law or in practice. Thus, the identity of the Applicant is very clear on the face of the notice of motion and the very affidavit, supporting the said notice of motion.
2. This Honourable Court having made an order on the 16th February 2021, that Mrs. Rugiatu Kabba, be joined to defend the action in her capacity to administer the estate of her deceased husband, who was a Defendant before his death, it ought to have followed as a matter of law, procedure and inextricable logic, that the entire proceedings, should have been set aside, if any sense were to be made of the order of this Honourable Court.
3. Counsel relies on the Court of Appeal decision in the case of Dr. Joseph Mahoi and Others v. Kofi Collin Macauley (Civil App. 29/2020 and Sub-rules (1), (2) and (3) of Rule 9 of Order 18 of the High Court Rules, Constitutional Instrument NO.8 of 2007 (hereinafter referred to as The High Court Rules, 2007), in justification of his submission, mentioned in two (2) above.

1.2 The Analysis.

The jurisprudence on preliminary objection is still evolving, with a plethora of decided cases in Sierra Leone and the Commonwealth jurisdiction. Meanwhile, the salient principle, underscoring any preliminary objection is that, it must be based on a point of law; if it is to be entertained by any court of competent jurisdiction. The Courts' decisions *Takor Tropical Hardware Co. Ltd. v. The Republic of Sierra Leone* (ECW1 CCJ/JUD/02/19 (2019) ECOWAS CJ1 (24TH January, 2019); *Zaria Amira Amina Mara v. Managing Director Standard Chartered Bank and Others* (FTCC 237 of 2018) (2019) SLHC 47 (11 July 2019); *Yaya v. Obur and Others* (Civil Appeal 81 of 2010) (2020 UGHC 165 (30 October, 2020); *Kassam Kousa v. Alie Basma* (CC:215/2019/C NO.31); *Lovetta Bomah and Others v. PMDC* (cc306 of 2018) 2021 SLHCL PED 27 (16 March, 2021); and *S v. Joseph Saidu Mans. And Another* (CC: 31 OF 2018 2021 SLHC LPED 27 (16 March, 2021), are unambiguously instructive on this point. In fact, a preliminary objection is not a preliminary objection, if it is based on facts, which evidential significance, can obviously be determined during the course of the proceedings.

Thus, when heard, a preliminary objection can either be disposed of immediately; or its ruling may be deferred, in circumstances wherein its determination, will undoubtedly impact the outcome of a matter {see *Yaya v. Obur and Others* (Civil Appeal 81 of 2010) (2020 UGHC 165 (30 October, 2020)}. Contextually, the preliminary objection, on which this ruling is based, is bound to be examined at this stage, because it is clearly predicated on law (not on facts); and should be immediately determined, because the legal issues that characterize it, would have no impact on the outcome of this matter, should it proceed to its logical conclusion. Furthermore, let me hasten to state that, Tamba Kelly's reliance on the Court of Appeal decision in the case of *Dr. Joseph Mahoi and Others v. Kofi Collin Macauley* (Civil App. 29/2020 and Sub-rules (1), (2) and (3) of Rule 9 of Order 18 of the High Court Rules, Constitutional Instrument NO.8 of 2007 (hereinafter referred to as The High Court Rules, 2007), in justification of his submission, mentioned in two (2) above; is brilliant and well-thought out, but it should be noted that, it is not of any significance to the negation of the preliminary objection, which is to be determined at this state.

Thus, that brilliant submission is inextricably linked to the final determination of the substantive application of 10th June 2021, which is not the principal concern and thrust of the preliminary objection, that must now be determined. Therefore, I will not countenance it, in this ruling. Meanwhile, I will proceed to unpick the merits of the arguments, which are thus chimed with the nucleus of the preliminary objection. First, the submission that the papers filed do not show who is the Applicant and who is the respondent and it also does not show who is the Plaintiff and the Defendants to this action; is not adequately and convincingly responded to. The objection on this point is quite apt and trite. When an interlocutory application is made for determination, the vehicle or mechanism, pursuant to which the application is made (the notice of motion in this case), must clearly and correctly depict, the title of the parties to the original action; and their subsequent descriptions, in accordance with the contents of the interlocutory application.

Thus, in the original action, Rugiatu Kabba, has been made one of the Defendants, by virtue of this Honourable Court's order, dated 16th February, 2021. This presupposes that she automatically became one of the Defendants to this action, on the very day the order was made. So, in the original action she is a Defendant. Moreover, now that she has filed a notice of motion for praying for the

aforementioned orders, pursuant to an interlocutory application, she by virtue of the said application, becomes the Applicant. Therefore, regarding the interlocutory application, the notice of motion must describe her as a 'Defendant/Applicant'. The question that is to be asked at this stage, is whether the papers as filed: the notice of motion and the affidavit in support thereof, aptly and tritely describes the said Rugiatu Kabba, as such? The answer is no. Rather, she is described as the 'Applicant/Defendant' in both the notice of motion and the affidavit in support thereof. This description is imprecise and does not clearly depict the Defendant/Applicant's position in the application and the original action. Again, an evaluation of the papers as filed for compliance (with the rudimentary rules of civil procedure), establishes that even the 'Plaintiff/Applicant' is not described as such, but he is described, in another way in contradistinction of the rules. This procedural incongruity, cannot be entertained by this Honourable Court.

Secondly, the argument that there is nothing on the face of the notice of motion, referring to the affidavit, supporting the application; is not clearly responded to. Again, an examination of the notice of motion, depicts that there is nothing in it, pointing to whose affidavit, Counsel relies on to bolster the application, for this Honourable Court to be convinced and felt compellable that it must grant the orders as prayed, in the interest of justice. The last paragraph of a clinically drafted notice of motion, is always framed to reflect the words "TAKE NOTICE THAT at the hearing of the Application it is intended to use the Affidavit of ----- sworn to on the ----- day of ----- 2021 together with the exhibits attached thereto and filed herein and any other Affidavit that Counsel may seek leave to use". The absence of the foregoing paragraph, containing the aforementioned words in any notice of motion, gives the indication that, that notice of motion is not properly before a court of competent jurisdiction; as there is nothing therein, establishing whose affidavit really bolsters the application.

Certainly, procedurally, such a notice of motion is deemed to be unsupported by an affidavit; and no reasonable tribunal of facts, can or will entertain, such procedurally incongruent notice of motion in the context of any genuine civil practice; devoid of irregularities, manifesting a clear contravention of the rules. As it stands, the affidavit supporting the application and the exhibits attached thereto, cannot be relied upon; as there is nothing the notice of motion, indicating that Counsel is going to rely on it. Essentially, civil practitioners are expected to be quite

pedantic in approaching a civil court of competent jurisdiction, when filing their respective papers, for the very orders that they are in dire need of, to applause their clients', whose civil liberties, might have been infringed upon in violation of the law. Thus, I will certainly conclude that the application is of no moment, before the court and Counsel for the newly added Defendant/Applicant, shall pay a cost of one million leones (Le 1, 000, 000) to Counsel for the Plaintiff/Respondent, for these fatal irregularities, which could have been addressed, had Counsel for that Defendant/Applicant, cross-checked and fact-checked the contents of his papers, before filling them. The application is struck out and Counsel is encouraged to go re-do his papers; praying for the apposite orders, that the justice of this case really demands. I so order.

The Hon. Dr. Justice Abou B.M. Binneh-Kamara, J.



15/3/2022

Justice of Sierra Leone's Superior Court of Judicature