CC: 387/19 2019 N0.13

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Abibatu Ade Mustapha - Plaintiff

(Suing by Her Attorney Mohamed Tholley)

N0.7 Malta Street

Kola Street

Calaba Town

Freetown

And

Mrs. Adama Momoh - 1st Defendants

Mr. Ibrahim George - 2nd Defendant

Mr. Sheku Bayoh -3rd Defendant

Mr. Christopher - 4th Defendant

Gbendembu

Goderich

Freetown

Counsel:

A.M. Kamara Esq. for the Plaintiff

A.K. Kargbo Esq. for the 2nd Defendant

E.S. Banya Esq. for the 3rd and 4th Defendants

Ruling on Applications for a Stay of Execution and/or for the Judgment of this Honourable Court of 6th February 2020 to be Set Aside on the Ground of Audi Alteram Partem, Delivered by the Hon. Justice Dr. Abou B.M. Binneh-Kamara, J. on Thursday 4th May, 2023.

1.1 Background and Context

This is a ruling contingent on two applications by notices of motion, dated the 4th March and 13th July 2020, filed by E. S. Banya Esq. and A. K. Kargbo Esq., for the same or similar orders to wit:

1. That this Honourable Court grants an order staying the execution of the judgment in default of defence dated the 6th day of February 2020 of the matter intituled CC: 387/19 2019. M. N0. 13.
2. That the judgment in default of defence be set aside on the ground of natural justice and audi alteram partem.
3. That the 2nd, 3rd and 4th Defendants be at liberty to file their respective defences.
4. That the cost of this application shall be cost in the cause.

The notices of motion are supported by the affidavits of Emma Banya Sama and Abdul Karim Kargbo respectively, sworn to and dated 4th march 2020 and 13th July 2020. The first affidavit constitutes sixteen (16) and the second contains thirteen (13) paragraphs, setting out the facts on which the respective applications are built. Both applications crave the Bench's indulgence to grant the same or similar orders. I will therefore deal with them concurrently and simultaneously determine whether they are meritorious enough for the orders as prayed to be granted.

1.2 <u>The Submissions of the 3rd and 4th Defendants' Counsel</u>

Counsel for the 3rd and 4th Defendants (E. M. Banya Esq.) made the following submissions:

1. There are six (6) exhibits attached to the application's supporting affidavit; marked ESB1-6. The action was commenced by a writ of summons dated 8th November 2019. That writ was never served on the 3rd and 4th Defendants. In fact, the 4th Defendant does not have any legal or equitable interest in the property. The fee simple absolute in possession in respect of that realty belongs to the 4th Defendant's wife. Exhibit ESM2 is the title deed of the 4th Defendant's wife.
2. The 4th Defendant's wife has already sold the property to a third part, who is now a bene fide purchaser for value. The fact that we were not served, means our right to defend this action will be unjustly taken away from us, should we not be given the opportunity to defend the action. Therefore, we should be allowed to defend in the interest of justice; and for the Bench to set aside its judgment dated 6th February 2020, so that the action can be expeditiously determined on its merits.
3. The application is made pursuant to Order 13 Rule 9 of The High Court Rules 2007, Constitutional Instrument N0. 8 of 2007 (hereinafter referred to as The HCR 2007).

1.3 <u>The Responses of the Plaintiff's Counsel to the Above Submissions</u>

The Plaintiff's Counsel (Alhaji M. Kamara Esq.) raised the following arguments in response to the foregoing submissions:

1. They have not stated the ground on which they want the court to set aside the judgment. There is an affidavit in opposition and a

supplemental affidavit in opposition sworn to by Alhaji M. Kamara. Paragraph 7 of the affidavit in opposition (not the supplemental) depicts that they were served. That averment amounts to a presumption of regularity that is not rebutted.

2. Paragraphs 3 and 5 of the affidavit in opposition, established that their predecessor- in –title, had no title to pass to the Defendants; the property he sold was never his.
3. The default judgment should not be set aside because their defence is a sham.

1.4 <u>The Submissions of Counsel for the 2nd Defendant</u>

Counsel for the 2nd Defendant (A. K. Kargbo Esq.) made the following submissions:

1. There are six (6) exhibits attached to the application's supporting affidavit; marked AKK1-6. That affidavit is relied on in its entirety; with a concentrated emphasis on paragraphs 2, 5, 6, 8, 9 and 11. There is as well a supplemental affidavit sworn to by Abdul Karim Kargbo and dated 27th January 2021. And there is one exhibit attached to it and it is marked Exhibit AKK7.
2. The application is propelled by Order 16 Rules 4 and 11 of The HCR 2007. The 2nd Defendant was never served with the writ of summons and a judgment in default of defence was taken out. It was that judgment that was served on the 2nd Defendant's tenant. The 2nd Defendant was never given the opportunity to be heard; that is the reason why the application should not be granted.

1.5The Responses of the Plaintiff's Counsel to the Above Submissions

The Plaintiff's Counsel raised the following arguments in response to the foregoing submissions:

1. The 2nd Defendant did not pray on the face of the motion that he was never served. The fact that he did not say the judgment was irregularly obtained amounts to a condescension that the judgment was regularly obtained.
2. Courts are bound, when setting judgments aside to examine whether Defendants really do have genuine and meritorious defences. In this circumstance, the 2nd Defendant's propose defence amounts to a general denial and does not constitute a good defence. He is obliged by Order 21 Rules 8 (2) and 13 (3) of The HCR 2007 to make good averments.
3. The 2nd Defendant has relied on a survey plan, which is not a conveyance. So his propose defence is of no moment before the Court. The Statute of Frauds says anything relating to a claim of ownership to land must be evidenced in writing.

1.6 The Analysis

The writ of summons, commencing this action, was originally issued by Alhaji M. kamara Esq. (deceased) on behalf of the Plaintiff, pursuant to Order 5 Rules 1 and 5 of The HCR 2007, against the Defendants for a declaration of title to a realty, recovery of possession, damages for trespass, cancellation of deeds, interlocutory injunction, perpetual injunction and cost, on 12th November 2019. Thus, on 8th July 2020, the writ was personally served on the 1st and 2nd Defendants, pursuant to Order 10 Rule 2, but the other Defendants were not served. Since the writ was not personally served on the other Defendants, the

Plaintiff's counsel by an ex parte notice of motion, dated 12th November 2020, requested that service on the 3rd Defendant be done by substituted means, relative to Order 10 Rule 5 (see paragraphs 5 and 6 of the ex parte notice of motion's supporting affidavit). The Court's records do not show that an Order for substituted service was made, because the 3rd Defendant was not personally served, but there is an ex parte motion on file, requesting for substituted service on the 3rd Defendant.

This automatically means that the 3rd Defendant was neither personally nor by substitution served with the writ. This clearly impugned Order 10 Rules 2 and 5. And service of Courts processes is crucial to civil litigations. In fact, it is so crucial that it is the only means, by which litigants get to know that actions have been commenced against them. Without knowledge that an action has begun against anyone, they would neither be able to enter appearance, nor participate in any stage of the Court's proceedings. In effect, litigants who are not served with processes, are denied the opportunity of being heard, which is an essential constitutional compulsion, that every reasonable tribunal of facts must respect and uphold. The maxim is 'audi alteram partem' (here the other side).

Meanwhile, Counsel for the 2nd, 3rd and 4th Defendants submitted that their clients were not served with the requisite Court's processes. And have urged the Bench as a matter of strictissima juris to set aside the judgment of 6th February 2020. This submission necessitates a thorough exploration of decisions of the Superior Court of Judicature in circumstances, wherein rules are infringed and subsequently default judgments taken by the very litigants that might have infringed the rules. But first let me unpick the issue of whether the 2nd Defendant was or was not served. The evidence is clear that the 1st and

2nd Defendants were served. There is an affidavit of service to that effect. But the contention which the 2nd Defendant's Counsel raised is that his client was not served. Does the evidence really substantiate this contention? Paragraphs 2, 3 and 4 of the affidavit supporting the 2nd Defendant's Counsel's motion for the judgment of 7th February 2020 to be set aside can be of help in answering the above question. Thus, for ease of reference, I hereby regurgitate the said paragraphs:

> Paragraph 2: I was reliably informed and verily believe that the 2nd Defendant… had no knowledge of such matter against him, not until the judgment in default of defence dated the 6th day of February 2020 was served on his tenant…
>
> Paragraph 3: That soon after the 2nd Defendant… received the said Court Order, he sought my services and instructed that I entered appearance on her behalf and filed the necessary papers to stay the execution of the judgment in default of defence.
>
> Paragraph 4: That I entered an appearance for and on behalf of the 2nd Defendant… on the 30th day of March 2020. The Memorandum and Notice of appearance is hereby exhibited and marked Exhibit AKK2.

However, neither the memorandum of appearance nor the notice of appearance entered is dated. Without being pedantic with the rules, it behoves every Counsel to always date their processes when filing them. The importance of time in the rules cannot be overemphasised**.** A manifest disregard for time and its exigencies, will cripple the edifice of any civil litigation. So, the fact that the 2nd Defendant's Counsel did not date his processes, concerning appearance, has raised a plethora of questions. First, how can the Bench be convinced that the 2nd Defendant was not served when there is an affidavit of service on file that he was personally served with the writ of summons on 6th July 2020? Second, does this evidence of service, as confirmed in the Plaintiff's affidavit in opposition, hold sway over the 2nd

Defendant's Counsel's statements in paragraphs 2, 3 and 4 of his supporting affidavit? Why were the documents attached to the supporting affidavit, marked AKK2 not dated?

Third, assuming without conceding that the processes, concerning appearance were filed on the said date, why did they have to wait for a little over four (4) months to file their proposed defence after a judgment in default of defence, had been taken, since 6th February 2020? On the strengthen of the evidence that the 2nd Defendant was personally served with the writ, I am not convinced that the averment by his Counsel that he was not served, should hold sway in the circumstance. There is the presumption of regularity that he was served, but there is nothing in evidence convincing the Bench that he was not served, that is sufficient for the Court to hold as such. The other procedural issue, which is distilled from the facts deposed to in the 2nd Defendant's opposing affidavit, which is responded to by the Plaintiff's Counsel is whether the judgment was regularly or irregularly obtained.

The Plaintiff's Counsel anchored his submission on the same issue of service. He contended that the 2nd Defendant did not pray on the face of the motion that he was never served; adding that because he did not say the judgment was irregularly obtained, that is a condescension that the judgment was regularly obtained. This submission is crucial to the consideration of whether a court of competent jurisdiction cannot set aside a default judgment that is regularly or irregularly obtained. The question of setting aside default judgments has also been conscientiously approached uniformly by the Courts. The first issue that the Courts consider in the determination of applications, geared towards the setting aside of judgments, is whether such judgments are regularly or irregularly obtained.

Thus, regularly obtained judgments are those taken in strict compliance with the rules of evidence and procedures; whereas irregularly obtained judgments are those taken in contradistinction to the rules of evidence and procedures. Meanwhile, default judgments are those taken in the absence of litigants on the other sides, principally because they have failed to comply with the dictates of the rules, regulating civil proceedings. This depicts the fact that default judgments are cognate with procedural (not substantive) justice. Procedural justice presupposes a form of justice, based on strict compliance with the rules of procedures; whereas substantive justice concerns the final determination of litigations, based on the content (the law) and context (the facts) of every case. So, when there are civil litigations, it is expected that the contending parties would come forth with the appropriate evidence on which they rely; and simultaneously comply with the timelines in the rules, while filing their apposite applications.

At any stage of particularly the interlocutory proceedings that parties fail to file the requisite papers in compliance with the rules the consequences are serious. It is against this backdrop that default judgments (for example judgments in default of appearance and subsequently defence are taken). Thus, the evidence in the instant case shows, that a judgment in default of appearance should have been taken against those Defendants that were served, but chose not to enter appearance. This would have occasioned substantial cost, that should have been paid to the Plaintiff's Counsel, had he chosen to enter a judgment in default of appearance, which the Court should have granted. What was rather entered was a judgment in default of defence, which the Court conscientiously granted.

Again, the evidence shows that there was no procedural incongruity in the proceedings, regarding compliance with the rules in relation to the 1st and 2nd Defendants, because they were accordingly served. Concerning the 3rd and 4th Defendants, the evidence is clear that they were neither personally nor were they served by a legally sanctioned substituted means. This means the judgment in default of defence in respect of the 3rd and 4th Defendants, were irregularly obtained. So, the same judgment is regularly and simultaneously irregularly obtained, when unpicked from the perspectives of the individual Defendants.

Meanwhile, it should be borne in mind that, nothing precludes the Courts in setting default judgments aside, even in circumstances wherein processes are served on Defendants, who could neither enter appearances nor file defences and/or counterclaims, within the timeframe prescribed in The HCR 2007. So, every default judgment, whether it is regularly or irregularly obtained can be set aside. When default judgments are regularly obtained, they can only be set aside on terms. This is to give effect to the constitutional principle: audi alteram partem. But parties against whom default judgments are obtained, are obliged to comply with the terms on which such judgments are ordered to be set aside. However, this is not the case when it comes to setting irregularly obtained judgments aside. Thus, irregularly obtained judgments are set aside ex debito justitiae: as of right (not on terms). This is also geared towards giving succour to the foregoing constitutional principle.

The fundamental presupposition underscoring default judgments is that they are obtained in contravention of the rules. Essentially, the Courts are bound to give effect to every rule of law, sanctioned by the legal system. Therefore, proceedings that are done by default, are bound to be conducted in

accordance with the rules. Thus, Buckley, L. J. in Hamp-Adams **v.** Hall (1911) 2 K.B. 94 stated that '… where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; this is a matter of strictissima juris'. This sacred principle of civil procedure was replicated in SLOF **v.** P. B. Pyne-Bailey (1974) SLSC 1, Day **v.** RAC Motoring Services Ltd. (1999) 1 All ER, Evans **v.** Berthlam, 2 All ER 646, The Saudi Eagle Case 2 Lloyd's Report 221, Yemen Co. Ltd. **v.** Wilkins etc.

The next issue to consider is the appropriateness of the provisions in The HCR 2007 cited in support of the applications of the respective Counsel. Counsel for the 2nd Defendant relies on Order 16 Rules 4 and 11; whereas that of the 3rd and 4th Defendants relies on Order 13 Rule 9. The intriguing question that arises at this stage is why should the respective Counsel rely on different provisions in The HCR 2007 in respect of two different, but similar applications for the same or similar orders? This question necessitates a thorough exploration of the respective provisions relied on by both Counsel. Thus, Order 13 in general deals with default of appearance. However, rule 9 of the same Order states:

> **Where judgment is entered pursuant to this Order, it shall be lawful for the Court to set it aside or vary such judgment upon such terms as may be just.**

The foregoing rule concerns setting judgments in default of defence aside. The very judgment which the 3rd and 4th Defendants' Counsel now seeks to set aside is a judgment in default of defence, which is predicated on procedure not on merit. And it has already been established that whether default judgments are regularly or irregularly obtained, they can be set aside either on terms or as of right. Thus, the provision in the foregoing rule is clearly indicative of the

application's appropriateness. And being that it has also been established that the 3rd and the 4th Defendants were not served with the requisite processes, after the judgment in default of defence was taken out, it behoves the Bench to allow their Counsel to defend the action on the basis of the constitutional principle of audi alteram partem. This is only possible at this stage, should this Bench set aside the judgment of 6th February 2022 or stay its execution.

The 2nd Defendant's Counsel does not rely on Order 13 Rule 9. Rather, he relies on Order 16 Rules 4 and 11, to set aside a judgment in default of defence. Sequentially, rule 4 read:

> **(1) A defendant may show cause against an application made under rule 1 by affidavit or otherwise to the satisfaction of the Court**
> **(2) (2) Sub rule 2 of rule 2 shall apply of this rule as it applies for the purposes of that rule.**
> **(3) The Court may give a defendant against whom such an application is made leave to defend with respect to the claim, or the part of the claim to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it deems fit.**

Rule 11 also states:

> **Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just.**

Thus, the rules are quite clear. As shown above, whereas Order 13 concerns default judgments; Order 16 deals with summary judgments. It really seems paradoxical to this Bench that an application for setting aside a judgment in

default of defence, can be made pursuant to the provisions of Order 16, which exclusively purls around summary judgments. Thus, it should be noted that Order 16 does not have anything to do with judgments in default of defence; it generically concerns summary judgments. One wonders why Counsel for the 2nd Defendant invoked the provisions of Order 16 in an application of this nature. Being that it is now clear that the 2nd Defendant's Counsel's application is made under the wrong provisions, it means his motion of 13th July 2020 is of no moment before the Court and it is hereby struck out. Against this backdrop, the 2nd Defendant's Counsel, experienced as he is, knows exactly what to do, moving forward.

Even though Order 16 does not have anything to do with the appropriateness of the application, I shall (in passing) examine the rationale of the principal thrust of the salient applications that are made and granted under that Order for the edification of all and sundry. The authors of the English Supreme Court Annual Practice of 1999 (The White Book), upon which Sierra Leone's HCR 2007 is constructed, clearly articulated the legal significance of Order 16 applications, regarding summary judgments, between pages 162 and 199. The authors' pontification in Paragraph 14/1/2 found in page 163 is so pertinent to the Court's jurisdiction (in its determination of applications on summary judgments), that I am obliged to replicate here:

> **'The scope of Order 14 (*Order 16 of The HCR 2007*) proceedings is determined by the rules and the Court has no wider powers than those conferred by the rules nor any other statutory power to act outside and beyond the rules or any residual or inherent jurisdiction where it is just to do so'.**

Thus, the importance of Order 16 is justified in circumstances wherein there are certainly or rather plainly, no available defences to negate the statement of claims. Further, applications for summary judgments are as well rationalised in circumstances, wherein the defences to specific claims are constructed on an ill-conceived or unfounded points of law. The Courts' decisions in C.E. Health plc **v.** Ceram Holding Co. (1988) 1 W.L.R 1219 at 1228 and Home Office **v.** Overseas Investment Insurance Co. Ltd. (1990) 1 W.L.R. 153-158, are quite instructive on this realm of procedural justice. Rules 1, 2 and 3, which are the structural architecture upon which Order 16 applications are constructed, depict the following conditions precedent to enter an order for summary judgment: -the defendant must have filed a notice of intention to defend; the statement of claim must have been served on the defendant and the affidavit supporting the application must have complied with Rule 2 (1) of Order 16.

That is, the deponent of the facts to the affidavit must have been certain that there is indeed no defence to part of or all of his/her claims. This presupposes that it is a crucial condition precedent that the application's supporting affidavit, must have unequivocally serialised and verified the facts of the case, the cause of action, what is being claimed, and the conviction that there is no defence to the action, must as well be supported by the facts. However, a court of competent jurisdiction, frowns at granting a summary judgment, in every circumstance, wherein the affidavit evidence depicts, that there are contentious and triable issues, which can only be determined, pursuant to the conduct of a full-blown trial.

The criticality of an Order 16 application is that, should the court grant it, in an instance wherein it should not be granted; the defendant is automatically denied the opportunity of benefiting from the fruits of a fair trial, conducted by

an independent and reasonable tribunal of facts. And this will be certainly interpreted as a violation of the constitutional principle, that justice should not only be done, but it must be seen done {see Sections 23 (1), (2) and (3) and 120 (6) of Act N0.6 of 1991}. The Hon. Justice V. A. D. Wright, J.S.C., in Aminata Conteh **v.** The All Peoples Congress (SC. Civ. App. 4/2004) commented obiter, on the criticality of summary judgment, in the following explicit statement:

> **The object of the order is to ensure a speedy conclusion of the matters or cases where the plaintiff can establish clearly that the defendant has no defence or triable issues. This draconian power of the court in preventing the defendant from putting his case before the court must be used judiciously. A judge must be satisfied that there are no triable issues before exercising the discretion to grant… a summary judgment. The judge is also obliged to examine the defence in detail to ensure that there are no triable issues.**

Thus, the rationale for a critical examination of the defence is crucial to the granting of a summary judgment. This process entails the ability to discern defences that are sham, concocted and fanciful, from those that are factual, genuine and clothed with real prospects of success {see Swain **v.** Hallman and Another (2001) All ER page 91}. The process further requires a clear sense of ratiocination and judicial discernment. Significantly, the granting of a summary judgment, behoves a reasonable tribunal of facts, to thoroughly unpick and unpack the facts, relative to the substantive law and the procedural rules, underpinning the application. This has been the approach that has guided the courts in making orders of summary judgments.

However, consonant with the above analysis, I order as follows:

1. That this Honourable Court set aside the judgment in default of defence dated 6th February 2020 against the 3rd and 4th Defendants herein.
2. That the 3rd and 4th Defendants are at liberty to file a defence to the Plaintiff's statement of claims
3. That the cost of this application shall be cost in the cause.

I so Order.

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

Justice of Sierra Leone's Superior Court of Judicature.