

MISC APP 109/2023 2023 C N0.11

In the High Court of Sierra Leone  
(Land, Property and Environmental Division)

**Between:**

Mariama Zainab T. Conteh - Plaintiff/Respondent

(Administatrix of the Estate of  
Tapsiru Ai-Qasim Conteh (Deceased)  
Intestate of 9901 Breezy Knoll Court  
Mary Line Off N0. 1 Willis Lane  
Off Fourah Bay Road  
Freetown

**And**

Madina Alie - 1<sup>st</sup> Defendant/Applicant

59 Fourah Bay Road  
Freetown

Adama Mansaray - 2<sup>nd</sup> Defendant/Applicant

Aisha Conteh  
59 Fourah Bay Road  
Freetown

**Counsel:** Elvis Kargbo Esq. Counsel for the Plaintiff/Applicant

Emmanuel Teddy Koroma Esq. Counsel for the Defendant/Respondent

**Ruling on an Application on whether this Matter shall have been commenced by a Writ of Summons or an Originating Summons; whether it shall have been brought to the Family and Probate Division or the Land, Property and Environmental Division of the High Court of Justice; and whether it shall be struck out or dismissed, pursuant to Orders 5 Rules 3 and 4, 55 and 21 Rule 17 of The High Court Rules 2007, Constitutional Instrument N0. 8 of 2007 and Section 1 of the Constitutional Instrument N0.4 of 2019, Delivered by The Hon. Justice Dr. Abou B. M. Binneh-Kamara, J., on Thursday, 7<sup>th</sup> March, 2024,**

### **1.1 The Application**

The application which is to be determined herein was filed by E. T. Koroma Esq. (hereinafter referred to as Counsel for the Applicant) of Digital Chambers and of N0.3 Macdonald Street, Freetown, on 31<sup>st</sup> October 2023. The application is supported by the affidavit of one Mohamed Bangura, a Barrister and Solicitor of the High Court of Sierra Leone, attached to the said chambers. The application is made pursuant to Order 21 Rule 17 of The High Court Rules 2007 (hereinafter referred to as The HCR 2007). The principal thrust of the application is in respect of the following orders:

1. That the originating summons commencing the action should be struck out because of the following irregularities:
  - a. In view of the reliefs sought, the summons has been instituted in the wrong Division of the High Court of Justice; same should have been brought before the Family and Probate Division.
  - b. That the Originating Summons discloses no cause of action because the person whose Will is to be interpreted died intestate and that the Will is not even probated.
  - c. That the action should not have been commenced by an originating summons, because it is a contentious probate matter.

### **1.2 The Submissions of Counsel for the Applicant**

The court heard the motion on 9<sup>th</sup> November, 2023. And Counsel for the Applicant made the following submissions:

1. The process pursuant to which the action is commenced is materially defective. The originating summons seeks answers in respect of specific questions, relating to the interpretation of a Will, which is said to be that of Alhaji Mohamed Bangali Conteh. In fact, the originating process, depicts that the person whose Will is to be interpreted died intestate. So the question is how is it possible for a Will to be made by a deceased intestate?
2. That Exhibit MFB3 is a deed of gift. In that document Mrs. Khadi Bangura is the Donee and Tapsiru Conteh is the Donor. And the Donor is the person whose estate was administered by the Plaintiff. Counsel argues that the property was given inter vivo and that gift has not yet been challenged. And the said deed of gift has neither been set aside nor expunged. So, there is nothing to be administered in respect of the property at off Conteh Drive, Calaba Town, Freetown. That property was given out before the deceased's death.
3. The so-called Will Exhibited as MFB2 has not been probated. Thus, any actions in respect of that Will should be taken out by the executors/trustees. And such contentious probate actions are determined by the Family and Probate Division. The Land, Property and Environmental Division does not have anything to do with such matters. Order 55 Rule 2 (1) of The HCR 2007 is quite instructive on this point. And probate actions are commenced by writs and not originating summonses. The application concerns the determination of a Will. And this falls within the ambit of the Family and Probate Division.

### **1.3 The Submissions of Counsel for the Respondent**

The Respondent's Counsel (Elvis Kargbo Esq.) on the 9<sup>th</sup> November, 2023 responded to the above submissions in justification of why the application should neither be struck out nor dismissed.

1. The Applicants' Counsel should have filed an affidavit in opposition to the substantive application's supporting affidavit, but he chose to file a motion which is neither here nor there. The argument that the application should have commenced by writ and not by an originating summons is untenable. Sub-rules (1) and (2) of Order 55 are in respect of contentious probate actions, relative to the granting of probate, revocation or cancellation of deeds etc. The

action is in respect of an interpretation of a Will, so it is bound to be begun by originating summons and not a writ of summons.

2. The use of intestate in the originating summons is a mistake that can be remedied. Thus, the correct procedure was invoked in initiating the action.

#### **1.4 The Applicable Adjectival Law**

The issues raised in the motion of 31<sup>st</sup> October, 2023 inter alia concern some aspects of our jurisdiction's adjectival laws: The Rules of Procedure, otherwise known as the rules of civil proceedings. The fundamental procedural issue raised herein is the mode of commencement of proceedings in the High Court of Justice of Sierra Leone. This is a segment of civil procedure that most practitioners often take for granted, but others have been quite meticulous about it, because of its technical underpinnings. For this Bench, the provisions relating to the mode of commencement of proceedings in Order 5 of The HCR 2007 are deceptively simple. This is so because even the most senior members of the Bar can be caught by the deceptive simplicity of Order 5. The side note to the Order confines itself to 'the mode of beginning civil proceedings'. And the Order's main heading describes 'the mode of beginning civil proceedings in the court'. What is not in the side note that is in the heading is the prepositional phrase 'in the court'. Order 5 (1) confirms that civil proceedings (depending on the peculiarity of the facts of each case) can be begun by writ, originating summons, originating motion or petition. Rules 2, 3 and 5 of Order 5 deal with commencement of proceedings by writ of summons, originating motion or petition, respectively.

A thorough understanding of these provisions will certainly guide the processes of commencing proceedings by the foregoing modes. Rule 4 which is more versatile, explains the circumstances wherein civil proceedings can be commenced by either a writ of summons or an originating summons (see sub-rule 1). Therefore, this sub-rule leaves it to the discretion of the originator of the action to approach the court by either a writ of summons or an originating summons. However, in as much as sub-rule (1) gives the latitude to the action's originator to come by either modes, sub-rule (2) signposts two clearly defined circumstances in which it is appropriate for actions to be begun by originating summonses:

1. Wherein the sole or principal question at issue is or is likely to be one of the construction of an enactment of any deed, will, contract or other document or some other questions of law.
2. Matters in which there is likely to be any substantial dispute of fact.

The final limb of sub-rule (2) is also pertinent to allude to here. Notwithstanding the fact that actions that fall in the above categories can be begun by originating summonses, originators of civil actions are forbidden to do so, should they, after having commenced such actions, intend to apply for summary judgments, pursuant to Order 16, or in actions of specific performance. Thus, in those circumstances, it is appropriate for such actions to be commenced by writ of summonses. Again, it should be noted that Order 2 Rule 1(3) makes it quite clear that:

**‘The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by originating process other than the one employed’.**

The other pertinent issue of adjectival law that worth alluding to herein, resonates with the striking out or dismissal of actions for procedural nullities as opposed to mere irregularities. Again, the rules are quite clear on this point. The essence of the rules of civil litigation is to give credence to the ideals of justice. The Courts are bound to interpret the rules as such. In circumstances where there are irregularities, the courts as arbiters of justice, are bound to examine the seriousness of the irregularities and the extent to which such irregularities might cause undue hardship or injustice to the other sides, before making their decisions about whether such actions should be dismissed for procedural nullities or struck out for procedural incongruities. Issues of procedural nullities are cognate with very serious and fatal irregularities that cannot be cured by the courts. They are so serious that they are in stark contravention of the rules. They are as well so fatal that irrespective of whether it is the strict constructionist or intention seekers approach that is deployed in interpreting the rules, it would be manifestly clear that the rules have been completely flouted {**see Harkness v. Bell’s Asbestos and Engineering Ltd. (1967) 2 k. B. 729.**

Issues of procedural incongruities concern irregularities that are not fatal to nullify the proceedings. In these circumstances, the courts are bound to set aside wholly or in part the proceedings in which the non-compliance of the rules occurred, any steps taken in those proceedings or any document, judgment or order therein on terms of cost. And would order that the non-compliance be appropriately cured by the requisite amendments to be done within a reasonable timeframe. This in effect is the essence of Order 2(2) of The HCR 2007, but it is Sub-rule (1) of same that is mostly invoked by practitioners. The other issue concerns the procedural significance of Order 21 Rule 17. In general, Order 21 deals with pleadings, which are quite crucial to civil litigations. They are the mechanisms by which the parties factually get to know the actual nature of the disputes for which proceedings have begun. This accords them the opportunity to present their case to the court within the narrow compass of their pleadings within the stipulated timeframe. Order 21 Rule 17(1) states that:

**‘The Court may at any stage of the proceedings order to be struck out or amended any pleadings or the indorsement of any writ in the action, or anything in any pleading in the indorsement on the ground that-**

**(a) it discloses no reasonable cause of action, or defence as the case may be;**

**(b) it is scandalous, frivolous and vexatious;**

**(c) it may prejudice, embarrass or delay the fair trial of the action;**

**(d) it is otherwise an abuse of the process of the court;**

**and may order the action to be stayed or dismissed for judgment to be entered accordingly as the case may’.**

Finally, on this procedural side, Order 55 Rule 2(1) is referenced by both Counsel in support of and in opposition to the application. In general, Order 55 concerns contentious probate proceedings. Rule 1(1) deals with applications in respect of contentious probate matters, relating to the rectification of a will. Rule 1(2) says:

**‘... a probate action means an action for the grant of probate of the will, or letters of administration of the estate of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the**

**validity of an alleged will, not being an action which is non-contentious or common from probate business’.**

### **1.5 The Applicable Substantive Law**

This analysis of the substantive law unfolds with the submissions of both Counsel and the contents of their respective affidavits in relation to the law on succession. Indeed, the application is not unconnected with the law on succession and inheritance. Thus, I will first examine the legal regimes on succession and inheritance in our jurisdiction in tandem with the aforementioned adjectival law and subsequently determine whether the application should or should not be granted. The law on succession and inheritance purls around testate and intestate successions. Both testate and intestate successions are cognate with a torrent of issues, relating to the law of real property and equity and the law of trusts. Testate succession is primarily regulated by the Wills Act of 1837. This statute is applicable in our jurisdiction by virtue of section 74 of the Courts Act N0.32 of 1965. Judicially, a will as defined by Sir J. P Wilde in *Lemage v. Goodban* (1865) LR 1 P & D 57 is ‘... the aggregate of {a man’s} testamentary intention, so far as they are manifested in writing, duly executed according to statute’. This definition resonates with that in *Re Berger* (1989) 1 All E R 591, which was also adopted in *Baird v. Baird* (1990) 2 A.C 548 (30<sup>th</sup> April 1990).

That definition states that a will ‘is an instrument by which a person makes a disposition of his property after his decease which in its own nature is ambulatory and revocable during his lifetime’. Thus, section 9 of the Wills Act 1837 makes it mandatory (not directory) that every will shall be underscored by specific characteristic features. These features are that: a will is a legal instrument for expressing testamentary intentions. It must be in writing. It must be duly executed. It is ambulatory. And it must be revocable in nature. Thus, the validity of a will is consequent on two conditions: It must comply with the formalities of the Wills Act of 1837 and the testator must have the mental capacity to make it. Thus, a will must be signed at the end by the testator, or by someone authorised by him, and the signature must be made or acknowledged, in the presence of at least two witnesses,

present at the time, who must themselves sign it or acknowledge their signatures in the testator's presence. Further, according to section 15 of the Wills Act of 1837, a will witnessed by a beneficiary or beneficiary's spouse is not void, but the gift to that beneficiary or spouse is void. The persons appointed by a will to administer the testator's estate are the executors. A deceased person's property is in the care of executors who are empowered to deal as directed by the will from the time of the executor's death. The executors must, however, usually obtain a grant of probate from the High Court of Justice to confirm their right to deal with the estate. Appointment as executor confers only the power to deal with the deceased's property in accordance with his will and does not give them beneficial ownership, although the executor may also be a beneficiary under a will. The executors are mere trustees who are also in a fiduciary position by virtue of their appointments by the testator. The testators are holding on to that which is devised and bequeathed to the beneficiaries on trust. So, ideally, it is the executors that can sue or be sued in respect of the testator's estate (which is devised and bequeathed to the beneficiaries).

The position of the law on intestate succession is principally within the purview of the Devolution of Estates Act N0.21 of 2007 and the Administration of Estates Ordinance Cap.45 of the Laws of Sierra Leone, 1960. The beauty of Act N0.21 of 2007 (which amended specific portions of Cap. 45) is that it regulates issues of testate and intestate successions. Thus, originally Cap.45 of the Laws of Sierra Leone 1960, was not applicable to intestate succession concerning the estates of Muslims. The estates of Muslims who died intestate were statutorily administered under Cap.96 (The Mohammedan Marriage Ordinance) of the Laws of Sierra Leone, 1960. Nonetheless, the estates of Muslims who died intestate can now be administered, pursuant to the provisions of Act N0.21 of 2007. Section 38 of same accordingly amended subsection (1) of section 9 of the Mohammedan Marriage Ordinance, Cap.96. The legal framework regarding intestate succession is this: When deceased persons did not will their estates to any beneficiaries, their spouses are bound to take out letters of administration in the Probate Registry of the High Court of Sierra Leone. This done, they must proceed to take out vesting deeds in respect of the estates.



Further, Order 55 of The HCR 2007, resonates with contentious probate proceedings. Rule 2(3) of same, which concerns parties to action for revocation of grant thus provides:

**‘Every person who is entitled or claims to be entitled to administer the estate of a deceased person under or by virtue of an unrevoked grant of probate of his will or letters of administration of his estate shall be made a party of any action for the revocation of a grant’.**

However, in circumstances wherein letters of administration have not been taken, the estates vest in the Administrator and Registrar General, until the conditions in the appropriate statute are met. In such circumstances persons meddling with such estates are dubbed interlopers, because such estates are yet to vest in the beneficiaries.

### **1.6 Analytical Exposition of the Facts and the Law**

In civil litigations, the justice that the parties seek has a content and a context. The content is discernible in the applicable adjectival and substantive laws, and the context is located in the facts and facts-in-issue underpinning each case. Thus, the applicable laws that are cognate with the application have been articulated together with the facts as presented above. I will now proceed to examine every bit of the points, upon which the application is constructed. The first point is that in view of the reliefs sought, the summons has been instituted in the wrong Division of the High Court of Justice; same should have been brought before the Family and Probate Division. The action is brought to the Land, Property and Environmental Division. Thus, Order 55, as espoused above, concerns contentious probate proceedings. This presupposes that every probate matter that is underpinned by any contention, relative to the grant of probate of a will, its validity or revocation/cancellation; or letters of administration, its validity or revocation/cancellation, falls within the purview of the Family and Probate Division of the High Court of Justice.

Therefore, it would be wrong for such actions to be heard by the Land, Property and Environmental Division of same. The question that arises at this stage is whether the questions which are embedded in the originating summons are questions of facts relating to the circumstances envisaged in particularly Order 55 Rule 1(2) of The HCR 2007. The questions are quite clear and simple. They do not have anything to

do with contentious probate proceedings. They rather swirl around the interpretation of a statute: The Wills Act of 1837 referenced in 1.5. Order 5 Rule 3(1) makes it mandatory (not directory) for actions that are consequent on the invocation of statutory remedies to be begun by originating summonses (and not by writ of summonses). The provision thus reads:

**‘Proceedings by which an application is to be made to the Court or a Judge under any enactment shall be begun by originating summons except where, by these Rules or by or under an enactment the application is expressly required or authorised to be made by some other means’.**

Significantly, the first limb of the provision clarifies this Bench’s affirmative position that this is an action that is bound to be indisputably commenced by an originating summons. The provision’s second limb concerns the circumstances in which this sub-rule can be circumvented. First, contrary to the provision, if there is any other rule in The HCR 2007, that requires the commencement of actions (consequent on the invocation of statutory remedies) by any other mode, then that specific provision in that rule would supersede the generic provision in Order 5 Rule 3(1). Secondly, in situations where there are express statutory provisions, that make it mandatory for specific actions requiring statutory remedies, to be commenced by other modes other than originating summonses, such actions are bound to be commenced as stipulated in such statutes. Essentially, an examination of the two exceptional circumstances contemplated in Order 5 Rule (1), does not in any way salvage the contention of the Applicants’ counsel, on the mode pursuant to which this action was instituted.

Therefore, this Bench does not agree with counsel’s contention on this point. In his reply to the response of the Respondent’s counsel, counsel cautioned that his colleague did not address the main issues raised in the application; noting that he failed to address whether the division of the High Court to which the action is brought is correctly stated in the action’s originating process. He emphasised that the nature of the originating process, clearly depicts that the action concerns some very serious family issues. So nothing precludes counsel to have brought it to the Family and Probate Division of the High Court of Justice for determination. While I would

commend the Applicant's counsel for this brilliant inferential submission, I would simultaneously let him know that an inference is only probably true. What is indisputably true is that Order 5 Rule 3(1) clarifies the law's position, regarding the commencement of actions by originating summonses.

Section 1 of Constitutional Instrument N0.4 of 2019, concerns the Divisions of the High Court of Justice. There is absolutely nothing in that provision that would justify the submission that a matter that expressly concerns the interpretation of a statute should be brought under the Family and Probate Division, because it concerns family affairs. The other contention in the Applicant's counsel's reply is that the action is not properly brought under Order 5 Rule 3(1); noting that the enactment pursuant to which the action is brought should have been inscribed in the originating summons. Also, counsel noted that his colleague neglected the importance of Order 5 Rule 4(1). Again, counsel demonstrated a sense of ingenuity here, but he should remember that Order 5 Rule 4(1) leaves it to the discretion of the originator of the action to institute proceedings by either a writ of summons or an originating summons. So, it is not for the Bench to tell him the mode he should deploy to approach the Court for the appropriate remedies. Therefore, it is up to him to come to this Court by either mode. Again, in as much as sub-rule (1) gives the latitude to the action's originator to come by either modes, sub-rule (2) restricts this choice to only two circumstances:

1. Wherein the sole or principal question at issue is or is likely to be one of the construction of an enactment of any deed, will, contract or other document or some other questions of law.
2. Matters in which there is likely to be any substantial dispute of fact.

Thus, the commencement of this action by originating summons, dovetails with the first situation contemplated in Order 5 Rule 4(2). So, the Bench is convinced that this is an action that is accordingly begun in tandem with what is provided for in the rules. The submission that the enactment, pursuant to which the action is brought should have been inscribed in the originating summons cannot be controverted. That has been the case as a matter of practice and in accordance with the rules. Again, the Respondent counsel conceded to the fact that the use of the word 'intestate' in the papers as failed was an oversight borne out of a typographical error, which can be

amended. Apparently, this is the third ground, informing the contents of the Applicant's counsel's motion. It should be noted that, these two procedural incongruities, do not amount to a procedural nullity. The provision in Order 2(1) is clear on this point.

**'Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order therein'.**

And Order 2(2) empowers the Bench to make an order for such irregularities to be amended. The invocation of this provision would render Order 21 Rule 17, which deals with striking out of pleadings, nugatory in this context. Based on the foregoing analysis I will hold as follows:

1. The proceedings were properly commenced by an originating summons.
2. The originating summons shall be accordingly amended to reflect the enactment and the appropriate sections to the enactment, pursuant to the remedies sought.
3. The word 'intestate' shall be expurgated from the originating summons.
4. A cost of Le 1,500.00 be paid to the Applicant's counsel

I so order.

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

Justice of Sierra Leone's Superior

Court of Judicature.

