Misc. App. 18/2023 2023 B. N0.2

In the High Court of Sierra Leone

(Land, Property and Environmental Division)

Chernor M. Y. Bah - 1st Plaintiff/Applicant

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And

Alie Suma - Defendant/Respondent

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Counsel:

M. M. Tejan Esq., for the Plaintiff/Applicant

S. A. Nicol Esq., for the Defendant/Respondent

Ruling on a Preliminary Objection concerning whether this Matter shall have commenced by an Originating Summons or a Writ of Summons and whether it shall be struck-out or dismissed, pursuant to Order 21 Rule 17 of The High Court Rules, 2007 (Constitutional Instrument N0. 8 of 2007) (Hereinafter referred to as The HCR, 2007), Delivered by the Hon. Justice Dr. Abou B.M. Binneh-Kamara, J. on Wednesday, 12th March, 2024.

1.1 Background and Context

This court was approached with an originating summons dated 30th January 2023 by M. M. Tejan Esq. for a number of remedies, catalogued on the face of the summons. On the 28th February 2023, M. M. Tejan started moving the court on the content of the originating summons. It was at this stage that S. A. Nicol Esq. raised preliminary objections thereto. He argued that the originating summons should be either struck out or dismissed for it manifest contravention of Order 21 Rule 17 of the High Court Rules, 2007 (hereinafter referred to as The HCR 2007).

1.2 Preliminary Objections

Counsel grounded the preliminary objections on the following:

1. The document pursuant to which this action commenced is not an originating summons; it is so badly drafted that it cannot be dubbed as such. He said no questions of law had been posed for determination by this Bench; as required by The HCR 2007. In justification of this submission, he directed the Court's attention to the provision in Order 5 Rule 4 (2) (a) of same.
2. The Court lacks jurisdiction to preside over this matter by originating summons, because it is clearly stated in the rules that contractual issues hinging on specific performance cannot be brought for determination to the High Court of Justice through an originating summons. Counsel also directed the court to the same provision alluded to above.

1.3 The Responses to the Preliminary Objections

In opposition to the objections, Counsel made the following submissions:

1. The first limb of the objections indicates that the objections are improper in their entirety. Thus, there is no rule of law that says that originating summonses are bound to be underpinned by specific questions to be posed to the Court for determination. And non-contentious applications can as well be made by

originating summonses. This is sanctioned by the same Order 5 Rule 4 (2) which counsel on the other side has relied on. In this matter, the Respondent had undertaken in writing that should he fail to comply, the appropriate steps can be taken against him. Counsel says they are now prepared to take the appropriate step; and that is why they have initiated this action by originating summons (and not by a writ of summons).

1.4 The Applicable Adjectival Law

The issues raised in the preliminary objections of 28th February 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 of summonses, originating summonses, originating motions or petitions. Rules 2, 3 and 5 of Order 5 deal with commencement of proceedings by writ of summonses, originating motions or petitions, 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.

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'.**

1.5 The Applicable Substantive Law

The applicable substantive law to the preliminary objections concerns the circumstances, pursuant to which the courts are prepared or ill-prepared to uphold preliminary objections. The law on preliminary objections has continued to evolve with the evolving jurisprudence in the Superior Court of Judicatures of Commonwealth countries. The core principle, upon which every preliminary objection is built, is distilled from the idea that, a preliminary objection must raise a point of law; should it be heard and determined by any court of competent jurisdiction. The following cases have clearly elucidated this point: Taakor Tropical Hardware Co. Ltd. **v.** The Republic of Sierra Leone {ECW 1 CCJ/JUD/ (2019) {24th January 2019}; Zaria Amira Amina **v.** Managing Director Standard Chartered Bank & Others {FTCC 237, 2018} {11th July 2019}; Yaya **v.** Obur & Others {Civil Appeal 81 of 2010} {2020 UGHC 165} (30th

October 2020)}; Kassam Koussa **v.** Alie Basma {CC: 215/2019/C N0.1}; Lovetta Bomah & Others **v.** PMDC {CC 306 of 2018} {2021 HCSL LPED 27 16th March 2021}, S **v.** Joseph Saidu Mans. & Another {CC: 31 of 2018} 2021 HCSL LPED 27 16th March 2021}. In fact, a preliminary objection is not a preliminary objection, if it based on facts which evidential significance, can obviously be equally challenged by the requisite evidential evidence during proceedings. When heard, a preliminary objection can be disposed of immediately; or its ruling may be deferred in circumstances, wherein its determination, will undoubtedly impact the outcome of a matter: Yaya **v.** Obur & Others {Civil Appeal 81 of 2010} {2020 UGHC 165 (30th October 2020)}.

1.6 Analytical Exposition of the Laws and the Facts-in-issue

Essentially, the preliminary objections, on which this ruling is based, is bound to be heard because it is clearly predicated on procedural rules of law (not on facts); and should be immediately determined because, the legal issues that characterise it, would have no impact on the final outcome of this matter; should it proceed to its logical conclusion. The first objection against the matter being heard is that the document pursuant to which the action commenced is not an originating summons; it is so badly drafted that it cannot be dubbed as such. Counsel said no questions of law had been posed for determination by this Bench as required by The HCR 2007. In justification of this submission, he directed the Court's attention to the provision in Order 5 Rule 4 (2) (a) of same. Thus, it cannot be denied that the foregoing order, rule, sub-rule and paragraph are indeed relevant to partially substantiate the objection, but there are other provisions in The HCR 2007, that counsel should have alluded to in complete support of his objections.

A fortiori, Order 7 is quite instructive on the general provisions concerning originating summonses. Rule 1 makes it clear that this order is applicable to every originating summons made pursuant to The HCR or any other enactment applicable in our jurisdiction. Rule 2 confirms that every originating summons *(even an ex parte one)* must be in the appropriate form. Rule 3 generically clarifies the content of a real originating summons. Sub-rule (2) of Rule 3 alludes to the applicability of Rules 4 and 5 of Order 6, concerning the content of a writ of summons, to that of an originating summons. Rule 4 says Rule 9 of Order 6 shall apply to an originating summons as it applies to a writ of summons. This concerns a concurrent summons. Rule 5 is mutatis

mutandis cognate with the duration and renewal of an originating summons. Meanwhile, the principal thrust of the first objection is discernible in Order 7 Rule 3 (1) of The HCR 2007. This salient provision, which dovetails with Paragraph 7/3 of Page 66 of the English Supreme Court Practice, 1999 thus reads:

> **'Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the court, or as the case may be a concise statement of the relief or remedy claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy'.**

The central idea in counsel's first objection is that an originating summons which does not contain the apposite questions of law in relation to the facts-in-issue in every case is deficient and must not be heard by Sierra Leone's High Court of Justice. Counsel cautioned that this has been the rule and that is what sound practice deserves. I must state here that counsel never relied on Order 7 Rule 3 (1) as quoted above. He rather relied on Order 5 Rule 4 (2) (a) of same, which counsel on the other side equally relied on. As indicated above, the provision he relied on cannot precisely help this court to determine whether the objection should be overruled or upheld. Rather, it is Order 7 Rule 3 (1) that is of moment to the Court. Nevertheless, it is only partially (not completely) true to say that an originating summons that does not pose specific questions for determination by the Court is of no moment before the Court.

The foregoing provision in Order 7 is quite simplistic and pedantic. It makes it clear that an originating summons can as well contain **'… as the case may be a concise statement of the relief or remedy claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy'.** Therefore, when drafting an originating summons it is up to the originator of the action to either pose questions for the court for determination; or concisely frame the statement of the relief or remedy claimed with sufficient particulars to identify the cause or causes of action in respect of the relief or remedy that is sought. What is to be determined at this stage is whether as a matter of law, counsel on the other side, really complied with the dictates of Order 7 Rule 3(1) of The HCR 2007. This will certainly necessitate a

thorough examination of the content of the originating summons dated 30th January 2023.

Upon perusal of the said document I am convinced that the reliefs sought are concisely and craftily drafted in clearly defined statements, containing very sufficient particulars identifying the causes of action in respect of the reliefs claimed. Thus, it would be improper to leave Order 5 Rule 4 to fester unaddressed in relation to this analysis; as both counsel have accordingly relied on it. As indicated in 1.4, Order 5 Rule 4(1) concerns the circumstances wherein civil proceedings can be commenced by either a writ of summons or an originating summons. 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. Meanwhile, the second limb of Sub-rule (2) of Rule 4 of Order 5 resonates with the facts of this case. According to counsel, there is likely no substantial dispute of facts here. The Defendant undertook by a written document that should he fail to comply with the content of the document, the appropriate steps should be taken. Counsel says this is a clear non-contentious case. Thus, this fact, which is discernible in the originating summons, is indeed clear and straightforward. So, it is apt for this action to be commenced by originating summons. Against this backdrop, it would be inappropriate for this originating summons to be struck out, pursuant to Order 21 Rule 17. Further, this Bench would not invoke the provisions in Orders 2 Rules 1 and 2 and 23 Rule 6, to get counsel to do any

amendments to the originating processes; for the rules are clearly complied with. Rather I would relegate the preliminary objections to the doldrums and caution counsel to expeditiously proceed with his case; while I make no order as to cost.

I so Order.

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

Justice of Sierra Leone's Superior Court of

Judicature