MISC. APP. 163 2022 S. N0.19

In the High Court of Sierra Leone

(Land, Property and Environmental Division)

Between:

Alie Suma - Plaintiff/Applicant

52b Camanda Farm

Off Blackhall Road, Freetown

And

Alusine Turay (AKA Bendu) - 1st Defendant/Respondent

Marie Turay - 2nd Defendant/Respondent

27 Fisher Street, Freetown

Morlai Sesay - 3rd Defendant/Respondent

215 Low Cost Housing

Kissy, Freetown

Ibrahim Diollo - 4th Defendant/Respondent

3 Jenkins Street

Freetown

Chernor Mohamed Yayah Bah - 5th Defendant/Respondent

Jabbie Street

Freetown

Counsel:

S. A. Nicol Esq.

M.M. Tejan Esq.

**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 undated originating summons filed by S. A. Nicol Esq. for certain remedies, stated on the face of the summons. On 7th March 2023, S. A. Nicol Esq. started addressing the court on the originating process as filed. It was at this stage that M.M. Tejan 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 HCR 2007.

## 1.2 Preliminary Objections

Counsel grounded the preliminary objections on the following:

1. The mode of the application is improper and that the issues in this matter are highly contentious. They should have thought it necessary to have commenced this action by a writ of summons (and not by an originating summons). Counsel referenced Orders 5 Rule 4 (2) and 7 Rule 3 (2) of The HCR 2007 as the basis of his objections.
2. The document pursuant to which this action commenced: originating summons; cannot be properly so-called, because it is undated. He said the affidavit attacked to the originating process is sworn to and dated 16th December 2022.Counsel cautioned that the filing of an undated originating process was wrong in practice and that was in contradistinction of the rules; noting that such process should be struck out or dismissed, pursuant to Order 21 Rule 17 of The HCR 2007.
3. The prayers in the so-called originating summons, as well as the questions it raises are not unlikely going to raise very serious or substantial disputes of facts; indicating that the court was wrongly approached in this matter and must therefore strike out the originating process.

## 1.3 The Responses to the Preliminary Objections

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

1. The originating summons is signed by counsel and it is also dated. Assuming without conceding that it was neither dated, nor signed by counsel, that in itself would not have rendered the process a nullity. Counsel craved the court's indulgence to invoke the provision in Order Rule 1 (1) of The HCR 2007 to address the anomalies discernible in the originating summons.

2. There is no substantial dispute of facts; otherwise they should have failed an affidavit in opposition debunking the facts upon which the action is predicated.
3. The preliminary objections are unfounded in law and should therefore be dismissed with cost.

**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 mode of the application is improper and that the issues herein are highly contentious. Therefore, the originator of the action should have thought it necessary to commence this action by a writ of summons (and not by an originating summons); stating that the court would not be in a position to answer the questions embedded in the purported originating summons, because they involve highly contentious issues. The law on the modes of commencing proceedings in the appropriate division of the High Court of Justice has been clearly articulated above. As an addendum thereto, I would reference the provisions in Order 7 to determine whether or not the action has actually been commenced in compliance with the apposite rules of procedure.

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 foregoing provision in Order 7 is quite simplistic and pedantic. It makes it clear that although an … **'originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the court',** nothing precludes it from containing … '**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'.** In this case counsel rather chose to pose three specific questions, which this Bench should first answer in order for this matter to be swiftly determined. This is certainly in consonance with the rules, but can the court determine such questions without recourse to some other facts and facts-in-issue pertinent to this matter? The answer to this question is certainly no. An examination of the facts deposed to in support of the originating summons, together with its content, suggests that this is not a matter that is likely to be determined with little or no contention.

This factuality would have necessitated the commencement of this action by a writ of summons and not by an originating summons, pursuant to Order 5 Rule 4(2) of The HCR 2007. And the thrilling provisions in Order 7 would have accordingly guided the processes leading to the commencement of this action. Counsel's submission that, had his colleague had any contentions to the facts deposed in the supporting affidavit, he would have failed an affidavit in opposition, is considered pre-mature at this stage. It would have been procedurally unwise for him to have filed an affidavit in opposition to an originating process with which he had preliminary contentions. Procedurally, it was indeed wise of him to first challenge the process; whilst indicating in his

contentions that the matter could not have been proceeded with by an originating summons. This was exactly what he did. Thus, should the court confirm that the action was appropriately commenced, nothing would have precluded him, from challenging every bit of the facts deposed to, in the originating summons' accompanying affidavit, by filing an affidavit in opposition. **The second point of note is whether the court should dismiss or strike out the originating process for procedural nullity**, pursuant to Order 21 Rule 17. This contention cannot be sustained in the light of the provisions in the subsisting rules. Thus, 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'.**

Thus, according to Order 2 Rule 1 (2), the court may, on the ground that there has been such a failure as is mentioned in Sub-rule (1) of Rule 1 of the same Order, and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment, or order therein or exercise its powers under the rules to allow such amendments, if any, to be made and to make such order, if any dealing with the proceedings generally or as it thinks fit. Therefore, on the second contention, the Bench would discountenance the applicability of Order 21 Rule 17 and would avail itself of the importance of the rules in Order which it has this far relied on. In fact, Order 2 Rule 1, which counsel referenced is important to be quoted and as well applied to the contested mode of commencing this action:

> **'Where, in beginning or purporting to begin any proceedings 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 in therein'.**

Therefore, I will order as follows

1. That the Plaintiff's Counsel files a writ of summons within one week after this ruling.

2. That the Defendants' Counsel accordingly enter appearance within 14 days after this ruling.

2. That the Plaintiff's Counsel pays a cost of one thousand Leones (Le 1,000.00).

I so Order.

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

Justice of Sierra Leone's Superior Court of

Judicature