Misc. App. 169/2021 2021 M. N0. 42

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Mrs. Isata Mansaray (Nee Mambu) - Plaintiffs/Respondents
(As Beneficiary of the Estate of John
James Mambu: Deceased Intestate)
C/O 19 Smart Lane
New England Ville
Freetown

AND

Brima Mambu - Defendants/Respondents
Mosses Mambu
Makiatu Mambu
Mrs. Mansaray (Nee Mambu)
(As Beneficiaries of the Estate of
John James Mambu: Deceased Intestate)
C/0 N0. 19 Smart Lane
New England Ville
Freetown

AND

Mrs. Elizabeth Mambu - Proposed Interested Party/Applicant
Applying as the Surviving Spouse &
Beneficiary of the Estate of John James
Mambu: Deceased Intestate)
N0.19 Smart Lane, New England Ville

Counsel:

Sahid M. Sesay Esq. for the Plaintiff/Applicant

S. M. Tarawally Esq. for the Defendant/Respondent

U.D.F. Sesay Esq. for the Proposed Interested Party/Applicant

Ruling on an Application Made Pursuant to Order 18 Rule 6 (2) (b) (i) of the High Court Rules 2007 Constitutional Instrument N0.8 of 2007 (Hereinafter Referred to as The HCR 2007) for The Applicant (Who is not Yet a Party to this Action) to be Made a Party, Delivered by The Hon. Justice Dr. Abou B. M. Binneh-Kamara, J. on Wednesday 10th January, 2024.

1.1 Context

The originating summons commencing this action was issued on 13th April 2021 and served on the Defendants/Respondents. The Plaintiff's counsel S. M Sesay Esq. of Sahid Sesay and Partners moved the Court on 15th June 2021 on the contents of the originating summons and serialised the relevant facts that culminated in the action. The remedies which S. M. Sesay Esq. seeks for his client are rooted in Order 37 Rule 1 (1) of The HCR 2007. And procedurally, the action was appropriately commenced, consonant with the clearly defined provisions in Order 5 Rule 3 of The HCR 2007. So, no procedural incongruity is discernible in the papers as filed. Nevertheless, what is to be determined in this ruling is not the actual remedies for which the Applicant's Counsel has invoked the appropriate jurisdiction of this Court. Rather, what is to be determined here is an application filed by U.F.D. Sesay of Sesay and Partners, for her client (one Elizabeth Mambu) to be made an Interested Party in this action. This application was made by a notice of motion dated 18th June 2021. And the application's supporting affidavit was as well sworn to and dated 18th June 2021. After having been served with this application, S. M. Sesay Esq. genuinely requested the Court to clarify its procedure, when it comes to situations wherein certain facts are deposed to in an affidavit, which counsel on the other side is desirous of contending. The Bench was quit pedantic on this and categorically referenced its position, espoused in Haja Fanta Daramy (Suing by Her Attorney Mariama Kondeh) **v.** Emmanuel Sanko Sawyer and Others {SLHC CC. 12/20 2020}.

In that case The Hon Justice Dr. Abou Binneh-Kamara, J. held as follows:

> 'This trite law… is akin to a procedure similar to the rules of pleadings. The affidavit in support of the application of 23rd February 2020 is technically their statement of claim; and the affidavits in oppositions are the defences to their statements of claim (which are their affidavits in support). What should follow is a reply to their affidavits in opposition which is yet to be filed. I will endorse this analogy as it clearly dovetails with the position which This Honourable Court has taken in the determination of this objection. Circumspectly, it cannot be denied that the notice of intention to cross-examine was filed within a reasonable time {see Royal Bank of Canada **v.** Larry Micheal Jones, 2000 BCSC 520 (CANLII). What is clearly not complied with by counsel for the

Applicant is that he did not file the affidavits in reply to the affidavits in oppositions, concerning the scurrilous and spurious allegations which he wants to debunk. Against this backdrop and on the basis of the aforementioned authorities, it would be procedurally unwise to get Counsel for the Applicant to conduct the cross-examinations at this stage, without filling his affidavits in reply to the affidavits in opposition…'

Thus, on the strength of this authority, the Court ruled that the Applicant's Counsel must file his affidavit in opposition, before he could be permitted to cross-examine the deponent on the contents of the somewhat contentious affidavit, sworn to and dated 18th June 2021. At this stage, the Defendants' Counsel (S. M. Tarawally Esq.) chose not to file any affidavit in opposition, because he had no objection to the application. S. M. Sesay Esq. eventually complied and was thus allowed to do the cross-examination, which he rigorously did. Meanwhile, it is essential to first state the grounds on which the application of 18th June is predicated, before the opposing facts in both the affidavit in opposition and those elicited from the cross-examination are unpicked in the light of truth. For it is only the truth and nothing but the truth that can guide and guard the Court to determine whether or not the Applicant should be made a party to this action. So, the justice which is sought by the respective and intended parties is inescapably tied to the hidden truth, which is discernible from the evidence. Judicially, justice is said to have a content and a context; its content is rooted in the appropriate legal doctrines (statute and common law) and its context reflects the peculiarity of the facts of each case. This somewhat jurisprudential exposition is bolstered by Lord Donaldson MR in R **v.** Secretary of State for Home Department Ex parte Cheblak {1991} All ER 319.

1.2 The Submissions of the Applicant's (Interested Party's) Counsel

The Applicant's Counsel U.D.F. Sesay Esq. on 11th June 2022, addressed the Court on the contents of the application's supporting affidavit. He raised so many pertinent issues in consideration of why he thinks this Court in the interest of justice should grant the application. The facts serialised herein are the most salient upon which his submissions are contingent.

1. The affidavit in opposition was sworn to by one Mrs. Elizabeth Mambu and dated 18th June 2021. There are seven exhibits attached to it and they are marked Exhibits ENM1-7. That by reason of paragraphs 3 and 4 of the supporting affidavit the Applicant should be made a party, because she is the sole surviving spouse and one of the beneficiaries of the estate of her late deceased husband.
2. The proposed party is currently the head of the Mambu family and has since the death of her husband been the caretaker of the estate of the deceased, noting that she has been living in the estate for quite a good number of years without disturbance and nobody has ever questioned her right as a beneficiary of the estate of her deceased

husband. That there is no way this matter can be determined without she being made a party to it.

3. The application is contingent on Order 18 Rule 6 (2) (b) (i) of The HCR 2007.

1.3 The Submissions of the Plaintiff's Counsel

S. M. Sesay Esq. on the 22nd January 2022, moved the Court on the contents of the application's opposing affidavit. He raised so many important points that he thinks should prevent the Court from making the Applicant herein a party to this action:

1. That the Applicant's Counsel has not produced any evidence to establish that there was a marriage between the Applicant and John James Mambu prior to his death.

2. There is no affidavit in evidence controverting the actual facts deposed to in the affidavit in opposition. That the Applicant abandoned the deceased in 1977 with an eight-month old child. By then, the deceased was a civil servant working as a ranger in the Ministry of Forestry, but he was stationed in Makeni.

3. That after having abandoned the deceased the Applicant got married to one Mr. Lamboi with whom she had a child called Daisy Lamboi, who is now a grown up woman. That the Applicant lived with Mr. Lamboi up to when the deceased died. It was her children that brought her back to the deceased place long after his death.

4. That the Applicant said in paragraph 9 of her affidavit that she has been collecting rents in respect of properties at N0.19 Smart Lane New England without accounting for same. Her allegations that she has been using the proceeds to improve on the estate, do not absolve her from accounting to the deceased's eldest child (the Plaintiff).

5. That the Applicant has been meddling with the deceased estate without any authority to do so. That she is an outsider seeking to benefit from the very estate she had long abandoned before the deceased's death.

1.4 The Analysis

This analysis unfolds with the submissions of the Applicant and Plaintiff's Counsel, their respective supporting and opposing affidavits, the evidence elicited under cross-examination and re-examination, and the law on succession. The application that is being determined is inextricably linked to the law on succession and inheritance. This is the very point of law upon which the submissions of both Counsel are predicated. Thus, I will first examine the legal regimes on succession and inheritance in our jurisdiction and subsequently determine whether this Court should or not make the Applicant an Interested Party in this action. 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 JP 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 (30th 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, which is the concern of this matter in general and the application to be determined in particular, 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. Having contextualised the law on testate and intestate successions in Sierra Leone, the analysis is continued with the provision in The HCR 2007 regarding the circumstances pursuant to which proposed interested parties should be made parties to subsisting actions in the High Court of Justice. Thus, Order 18 Rule 6 (2) (b) (i) states:

> Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on terms as it thinks just and either of its motion or on application-(b) order any of the following persons to be added as a party: -(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

The question that arises at this stage is whether the evidence as adduced is sufficient and concrete enough to reasonably convince this Bench that the Applicant is indeed a beneficiary of the estate of the deceased and therefore should have been made a party to this action. The application's supporting affidavit is skewed in this direction, but the opposing affidavit contains other facts and facts-in-issue that contravene this. Nevertheless, a torrent of other facts, which are not embedded in the supporting affidavit, but raised in the opposing affidavit, came out clearly under cross-examination and re-examination of the Interested Party. The responses to the questions posed under cross-examination are thus serialised as follows:

1. I left the deceased in his life time. And I left him in 1979, but I returned after I had left him. I cannot recall when I returned. I do know Daisy Lamboi. She is still called Daisy Lamboi. She is my daughter. She is 39 years old. Mr. Lamboi is Daisy's father. She is not the daughter of the deceased. Daisy was born out of wedlock. The

deceased died in 1995. It was when I left the deceased that I begot Daisy. I begot her during the lifetime of the deceased.

2. I never got into the deceased house with Daisy Lamboi. After Daisy, I did not get children with the deceased in his life time. I did not introduce Daisy to the deceased. I lived with my parents at Dugan Street, Freetown. I eventually left my parents' place, but I cannot recall when that happened.
3. Exhibit ENM7(2) is a Freetown City Council demand note that does not bear my name. And my name does not appear in Exhibit ENM 7 (1). Exhibit ENM7(3) does not also bear my name. The deceased did not execute any document giving me that property in his life time. I do know the Plaintiff (Isata Mansaray Nee Mambu). She is my daughter. I do not Know a woman called Yalie Sesay. I am not the biological mother of the Plaintiff and I do not even know her mother.
4. The deceased had two wives in his life time: Isatu Mambu and I. Isatu Mambu is not the mother of the Plaintiff. I did not take letters of administration after the deceased's death. I now say I came to know the Plaintiff's mother in connection with the family meetings held in relation to the deceased's property.
5. I do not have a marriage certificate, confirming that I was married to the deceased. I now say that the Plaintiff mother is Yalie Sesay. I did not take Yalie Sesay to any court. And my elder mate did not also take her to any court. Yalie Sesay is now dead. The Plaintiff is the eldest to my own children. I did not know that Yalie Sesay took out Letters of Administration (LA). It was my lawyer that told me about the said LA. I do know the Plaintiff's younger sister. She is Kadiatu Tarawallie.
6. It was the deceased that drove me out of his house, after we had had a dissension that lasted for up to three years. I did not separate with him.

Analytically, the Plaintiff's mother took out LA upon the death of the deceased. Exhibit SMS3(1-3) uncontrovertibly justifies this. And the LA categorically describes Madam Yalie Sesay, the Plaintiff's mother, as the deceased's wife and next-of-kin. The LA was born in the womb of the Probate Division of the High Court of Justice of the Republic of Sierra Leone. And it has been subsisting since 18th November 2018. It contents have neither been controverted nor revoked. The evidence of the Interested Party that she did not aware of the fact that Madam Yalie Sesay had taken out LA is not sufficient to prevent her from contesting the validity of the LA and the eligibility of the person, to whom it was granted. As it stands, the LA was granted, pursuant to the appropriate provisions of the Devolution of Estate Act N0.21 of 2007. So, it remains valid, until it is revoked by the High Court of Justice. Moreover, the Interested Party initially lied that she did not know Madam Yalie Sesay, but later said she knew her. And also named another person, Isatu Mambu, whom she said was the deceased eldest wife. Even Isatu Mambu, if at all she is alive, can as well challenge the eligibility of Madam Yalie Sesay as administrator of the deceased's estate.

Meanwhile, the evidence is clear that even the Interested Party has not proved that she was indeed married to the deceased. She claimed that they were traditionally married, but has

not produced any evidence to that effect. It would be unwise for a court of competent jurisdiction to accept unsubstantiated facts, deposed to in an affidavit without proper scrutiny. This point is quite clear on the subsisting jurisprudence of civil procedure {see Ackner L J in Banque Deparis (S.A) **v.** de NASA (1984) Lloyd's Rep., at page 23}. What is really in evidence that would justify the claim that the Intended Party was married to the deceased? Exhibit ENM7(2) which is a Freetown City Council demand note that she produced does not bear her name. And her name does not appear in Exhibit ENM 7 (1). Even Exhibit ENM7(3) does not also bear her name. These are exhibits that came from her. Thus, it has already been established that the deceased died intestate. So, he could not have willed his property to anyone. And during his lifetime he did not execute any legal instrument passing his estates to anyone.

Moreover, the appalling bits of the evidence that is clearly in contravention of the Interested Party's case is that she left the deceased with an eight-month child and went to cohabit with one Mr. Lamboi for whom, she gave birth to Daisy Lamboi, who is now over 40 years old. So Daisy was born out of wedlock. This means she is a bastard. And it was after she had left the deceased that she begot Daisy, who is not the deceased's child. These pieces of evidence are too strong for any reasonable tribunal of facts to conclude that the Intended Party is a beneficiary of the deceased's estate. Her claims that she had a dissension with the deceased that culminated in her being driven by the deceased, but she eventually returned after a short hiatus, sound unconvincing to this Bench. The Bench is unconvinced about this claim, because of the simple fact that, she begot a bastard child with another man during this period and there is a fact deposed to in the opposing affidavit which is not controverted, that she was brought by her children to live in the deceased's house long after his death. When asked when she returned to the deceased's house, she said she could not even re-call. But the deceased died in 1995. She could not really tell the court whether she returned before or after the deceased's death.

Her Counsel submitted that by virtue of paragraphs 3 and 4 of the application's supporting affidavit, the Interested Party is the sole surviving spouse and one of the beneficiaries of the estate of the deceased; noting that she is the head of the Mambu family and has been the caretaker of the property. This evidence is again unconvincing to this Bench. She cannot be the head of the Mambu family, because there is nothing in evidence to prove that she was married to the deceased. Again, the evidence regarding when she returned to the deceased's house is unclear, because she said she could not remember when she returned, but the contending affidavit evidence, which is not controverted, states that she was brought back after the deceased's death. So, since there is no evidence that she was married to the deceased, she cannot be said to be a beneficiary of his estate, because she is not entitled to it. To take care of any property does not presuppose that you are the owner or beneficiary of it. So many circumstances can result in any person being made a caretaker of any property. But the evidence does not clearly depict how the Interested Party came to be the caretaker of the deceased's estate.

Counsel further said that the Interested Party has been living in the property for a good number of years without being interrupted by anyone; adding that she should therefore be made a party to this action. Legally speaking, this cannot be a reason why she should be made a party to this action. The provision in Order 18 Rule 6 (2) (b) (i) of The HCR 2007 is clear on this. In fact, it is unclear when the Interested Party returned to the deceased after she had abandoned him in 1977. This was also a question which she responded to by saying she could not remember for how long she was away, adding that she was living with her parents at Dugan Street, Freetown. But the evidence is clear that she was in another relationship with Mr. Lamboi. Again, the submission that she was expending the rents being collected to up keep the property is quite telling. First, rents should have been collected by Madam Yalie Sesay, since the day the LA came into existence. Therefore, the Interested Party has no business collecting rents. In fact, she should be made to account for all the rents she has so far been collected in respect of the deceased's estate. This Bench, based on the foregoing analysis, strikes out the application with a cost of Le 3,000.00 (new currency) and categorically states that the Interested Party cannot be made a party to the on-going action. I so order.

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

Justice of Sierra Leone's Superior Court of Judicature.