

FRIDAY & ORS v CONTEH & ANOR

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COURT OF APPEAL FOR SIERRA LEONE, Civil Appeal 13 of 1976, Hon Mr Justice S B Davies JA, Hon Mr Justice S C E Warne JA, Hon Mr Justice C S Davies JA, 7 March 1977

- [1] Land – Interest in land – Conveyance failed to refer specifically to premises – Purchaser entitled to specific performance had proprietary interest in land – Necessary to amend pleadings and join vendor as legal owner to the action – High Court Rules O 12 r 11 – Court of Appeal Rules r 31**

The High Court granted possession of premises at 47 Victoria St, Freetown to the respondents. The respondents' claim was made as legal owner of the premises based on an indenture of conveyance dated 18th March 1971 which had been registered with the Registrar-General at Freetown. In this appeal against the High Court's decision, it became apparent that the conveyance contained no reference to premises at 47 Victoria Street and therefore did not convey the premises.

Held, remitting the matter to the High Court:

1. As the vendor had given a memorandum under Section 4 of the Statute of Frauds then the respondent was potentially entitled to the equitable remedy of specific performance and thereby acquired a proprietary interest in equity which was enforceable against third parties. As beneficial owner in equity she was therefore entitled to sue apart from the indenture of conveyance and obtain possession of the premises. It was necessary for the respondent as beneficial owner in equity to join the person in whom the legal estate was vested, namely the vendor, who could be joined as a defendant to the action if he refused to join as plaintiff. Pursuant to r 31 of the Court of Appeal Rules and O 12 r 11 of the High Court Rules, the matter should therefore be remitted to the High Court to enable the respondent to amend her pleadings. *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 applied.

Cases referred to

Harmer v Armstrong [1934] Ch 65

Performing Right Society Ltd v London Theatre of Varieties Ltd [1924] AC 1

Legislation referred to

Court of Appeal Rules r 31

High Court Rules O 12 r 11

Statute of Frauds s 4

Other sources referred to

Megarry and Wade on Real Property 2nd Edition p 567

Appeal

This was an appeal by Teheh Friday and others against the judgment of Short J dated 4th March 1977 granting possession of premises at 47 Victoria Street, Freetown to the respondents, Alhaji Conteh and others. The facts appear sufficiently in the following judgment.

Mr C Doe Smith for the appellants.

Mr FM Carew for the respondents.

JUDGMENT OF THE COURT: This is an appeal from the judgment of Short J dated 4th March 1977 granting possession of certain premises situated at 47 Victoria Street, Freetown, to the respondents.

The respondents have claimed possession of the premises, arrears of rent and mesne profits from the appellants. The respondents' claim was based on an indenture of conveyance dated 18th March 1971 by which the first respondent claimed that the said premises had been sold and conveyed to her by one Nah Dembo alias Nehneh Nah, the indenture of conveyance having been registered as No 194 at page 150 in Volume 245 in the Book of Conveyances in the office of the Registrar-General, Freetown.

The matter was tried and judgment given as I have said.

It was during the arguments before us that we discovered that the Indenture of Conveyance - Exhibit "A" contained no reference to premises at 47 Victoria Street, Freetown, as its subject matter. In short it did not convey premises at 47 Victoria Street. The relevant portions of the conveyance read:

THIS INDENTURE is made the 18th day of March in the year of Our Lord One Thousand Nine Hundred and Seventy-One between *Nah Dembo alias Nehneh Nah* of Gbendembu, Freetown in the Western Area of Sierra Leone, Retired Seaman (hereinafter referred to as the Vendor) of the one part and *Marie Bangura* of 25 Cole Street, Freetown, aforesaid, widow (hereinafter referred to as "the Purchaser") of the other part:

WHEREAS WILLIAMS *Tieh Dembo alias Nehneh Tieh* late of 27, Victoria Street, Freetown aforesaid (hereinafter referred to as "the Intestate" was at the time of his death seised in fee simple in possession or otherwise well entitled to the land tenements and hereditaments intended to be hereby granted and conveyed and more fully defined and described free from incumbrances.

AND WHEREAS the Intestate died on the 5th day of December, 1951 at 27, Victoria Street, Freetown aforesaid without making any will.

AND WHEREAS Letters of Administration were granted by the Supreme court of Sierra Leone (Probate Jurisdiction) on the 25th day of January 1971 to *Nah Dembo alias Nehneh Nah* the lawful brother and only next of kin as sole Administrator of the Estate of said *William Tieh Dembo alias Nehneh Nah* to administer the same.

AND WHEREAS the Vendor the said *Nah Dembo alias Nehneh Nah* hath contracted and agreed with the purchaser for the absolute sale to her of the said land tenements and hereditaments hereinafter mentioned.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of two thousand two hundred leones (Le2,200.00) paid by the purchaser to the vendor before the execution of these presents (the receipt whereof the vendor hereby acknowledges). He the vendor as Administrator doth hereby give part surrender and convey unto the purchaser her heirs and assigns all that land tenements and hereditaments set out defined and described in the schedule at the foot or end of these presents UNTO and to the USE of the purchaser her heirs and assigns absolutely ...

The Schedule Herein above referred to:

All that land tenements and hereditaments situate lying and being at Victoria Street, Freetown in the Western Area of Sierra Leone a description of which is as follows:

Starting from Beacon Q91/65 on a Colony beacon ... and shown in survey plan No LS 320/71 dated 17th March, 1971 drawn and attached to these presents and therein edged or

verged RED or howsoever otherwise the same may be bounded known described or distinguished ...”.

That was the state of the Conveyance relied upon. The plan attached to it did not take the matter further as it merely referred to property at Victoria Street.

Counsel for both parties quite frankly admitted that it had never occurred to them that the conveyance bore no reference to premises at 47 Victoria Street.

Mr Carew, counsel for the respondent in defence of the situation referred us to Exhibit “D” the receipt for the purchase price, and has urged us to view the position thus: since the vendor had given a memorandum under Section 4 of the Statute of Frauds then the second respondent is potentially entitled to the equitable remedy of specific performance. She thereby acquired a proprietary interest in equity which is enforceable against third parties. She is therefore apart from the Indenture of Conveyance entitled to sue and obtain possession of the premises. I ought to state here that the respondent’s claim in the High Court was not as beneficial owner but as legal owner of the estate.

The position on the point raised by Mr Carew is stated thus in the Second Edition of *Megarry and Wade on Real Property* at page 567:

“If the purchaser is potentially entitled to the equitable remedy of specific performance he obtains an immediate equitable interest in the property contracted to be sold for he is, or soon will be, in a position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived. Equity looks upon that as done which ought to be done, and from the date of the contract the purchaser becomes owner in the eyes of equity (he cannot, of course become owner in law until the land is conveyed to him by deed). This equitable ownership is, as has been seen, a proprietary interest, enforceable against third parties. As between the parties to the contract it creates a relationship of trustee and beneficiary; the vendor is said to be trustee for the purchaser, and the purchaser to be beneficial owner ...”.

Let us assume that there had been no deed of conveyance of the property, can the second respondent as beneficial owner in equity sue to recover the property? She must do so by joining the person in whom the legal estate is vested namely the vendor or trustee. If the vendor or trustee refuses to join her as a plaintiff, then she could join him as a defendant to the action.

In *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, Lord Cave said:

“That an equitable owner may commence proceedings alone, and may obtain interim protection, in the form of an interlocutory injunction, is not in doubt; but it has always been the rule of the Court of Chancery and is, I think, the rule of the Supreme Court that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action: *Daniell’s Chancery Practice* 7th Edition Volume 1 p 172. If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceeding by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity and proceedings might be indefinitely and oppressively multiplied. Further under Order XVI r 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case ...”.

See also *Harmer v Armstrong* [1934] Ch 65 at page 82.

The solution to the problem had the respondent sued originally as beneficial owner would have been found in the above quote from Lord Cave's judgment.

Rule 31 of the Court of Appeal Rules provides:

"The court may from time to time make any order necessary for determining the real question in controversy in the appeal ... and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as court of first instance ...".

That gives this court the powers of Order 12 rule 11 of the High Court Rules which provides:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in any cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court may at any stage of the proceeding, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any parties improperly joined whether as plaintiff or defendant, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added."

In order to save time and expense in this matter I would order that this matter be remitted to the High Court and adjourned *sine die* to enable the second respondent to amend her pleadings in the light of the foregoing. The appellants are given liberty to amend their pleadings if as a consequence of the respondents' amendment it becomes necessary.

The costs of this appeal and the amendment to the defendants/appellants. Such costs to be taxed.

Reported by Anthony P Kinnear