SC. CIV.APP NO. 6/2005

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IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:

ALHAJI ABDULAI SESAY - APPELLANT

AND

EMAD BAHSOON - RESPONDENT

CORAM:

THE HON. MRS. JUSTICE S. BASH-TAQI – J.S.C.
THE HON. MRS. JUSTICE V.A.D. WRIGHT – J.S.C.
THE HON. MR. JUSTICE G.B. SEMEGA-JANNEH – J.S.C.
THE HON. MR. JUSTICE N.C. BROWNE-MARKE – J.A.
THE HON. MR. JUSTICE E. ROBERTS – J.A.

COUNSEL:

E.E.C. SHEARS-MOSES ESQ. AND MS. M.A.P. DAVIES FOR THE APPELLANT

R. JOHNSON ESQ. FOR THE RESPONDENT

JUDGEMENT DELIVERED ON THE 12TH DAY OF FEBRUARY 2010

SEMEGA-JANNEH – JSC

Alhaji Abdulai Sesay (Appellant herein and Plaintiff at the trial Court) and Emad Bahsoon (Respondent herein and Defendant at the trial Court) knew each other as employer and builder since about 1984. The relationship apparently blossomed into a friendship well before the dispute arose between them. Mr. Bahsoon did construction work for Mr. Sesay at various places in Freetown, including No. 24 Siaka Stevens Street, and also in Sefadu, kono,

where he lived in the premises of Mr. Sesay. Mr. Bahsoon at some stage even managed Mr. Sesay's Cinema house, "Roxy", in Freetown.

In about 1990, Mr. Bahsoon came to live at the premises in Bolling Street, occupying the 1st floor (ground floor) of the storey building. A sale agreement (Exhibit A) dated the 15th December, 1990, was entered into by Mr. Sesay and Mr. Bahsoon for the sale of property at Bolling Street, by Mr. Sesay to Mr. Bahsoon. The agreement was prepared by Ibrahim B. Kamara (PW2), a lay person. It was agreed that the sale transaction should be completed within three years as at the date of the agreement, that is, in 1993. Completion did not materialize in 1993. In 1998, after demanding execution of the conveyance of 4, Bolling Street, Freetown, prepared by his solicitors, without success, Mr. Bahsoon caused a writ to issue, claiming:

1. *Specific performance of the said agreement.*
2. *Damages for breach of contract.*

Mr. Sesay counter-claimed for possession and mesne profits at the rate of US $ 1000 per month until possession is yielded up or damages for trespass. On the 19th March, 2002, the trial Judge gave judgement for specific performance and dismissed the counter-claim of Mr. Sesay. As a result, Mr. Sesay appealed to the Court of Appeal against the decision of the trial Judge. The Court of Appeal, in its judgement dated the 30th day of November, 2004, upheld the judgement of the trial Court and, accordingly, dismissed the appeal. It is against this judgement of the Court of Appeal that Mr. Sesay appealed to this Court on six grounds of appeal, namely:

1. *That the learned Justices ignored the conduct of the Respondent in affirming the judgement which ordered specific performance of the agreement.*
2. *That the learned Justices did not avert their minds to the evidence that possession of the property by the Respondent was not*

consequent upon the purported agreement but prior to it, before affirming the order for specific performance.

3. *The learned Justices did not avert their minds to the identity of the portion of property involved in the purported agreement having recourse to the evidence.*

4. *The learned Justices failed to ignore the conduct of the Respondent in preparing a plan without the approval and knowledge of the Appellant who would demarcale the boundaries.*

5. *The learned Justices wrongly took the delay by the Appellant in canceling the agreement as acquiescence to the breach by the Respondent*

6. *The learned Justices failed to consider the validity of the purported receipts tendered by the Respondent.*

In its judgement dated the 30th day of November 2004, the Court of Appeal only dealt with the first ground of appeal which is that the decision of the trial Court is against the weight of the evidence having dismissed ground two, which is based on misapplication of the principles of law, on technical grounds. In dealing with ground one, the Court of Appeal proceeded to evaluate some aspects of the evidence and making some findings of fact in support of the trial Court's decision before deferring to its judgement, even though, the Court of Appeal was not oblivious to the submission of counsel for Mr. Sesay that the witnesses for Mr. Bahsoon were not truthful.

In my view, the trial Court, unlike the Court of Appeal, did not evaluate the evidence. The trial Court, after setting out the pleadings (from pages 70 to 72, inclusive, of the record), proceeded to recount (or narrate) the evidence (from pages 72 to 89, inclusive, of the record) and then plunged directly into dealing with the law and what she considered the legal issues of the case (from pages 86 to 96, inclusive, of the record) before finding for Mr. Bahsoon; and, consequently, ordered Mr. Sesay to sign the conveyance prepared by Mr.

Bahsoon's solicitors. What I consider to be an exception to the lack of findings of fact is the trial Court's view, that, and I quote:

> *"The defendant (Mr. Sesay) feigned not to be aware of the claim of government. In contrast to this there is Exhibit "F" which was written by PW2 (Ibrahim B. Kamara) to the Department of Surveys and Lands and it was at the instance of the Defendant. I had the opportunity to watch the demeanor of the witnesses both of the plaintiff, Pw2 and the Defendant and I am satisfied the Defendant was aware of the stalemate"*

However, this finding of fact has no basis on the evidence; Mr. Sesay never denied or pretended that certain government officials were claiming that his landed property at kingtom, Freetown, belonged to the state. He was absolutely certain that the claim was misguided and erroneous and took successful steps to correct the view.

The trial Court dealt briefly with the counterclaim (from pages 96 to 97, inclusive, of the record) and, surprisingly, in contrast to its treatment of the claim, made some findings of fact, that is, firstly, that Mr. Sesay at some point in time was the fee simple owner of property numbered 4 Bolling street, kingtom, and that sometime later he disposed of a portion to the government and by exhibit A (the sale agreement) he agreed to sell the remaining portion to Mr. Bahsoon; and, secondly, that it was agreed that Mr. Sesay took possession and occupation on a concluded agreement evidenced by exhibit A. Part of the first finding was never in dispute. What is in dispute is what portion or area of land Mr. Sesay agreed to sell and Mr. Bahsoon agreed to buy. As regards the second finding, there is no evidence that the parties agreed that Mr. Bahsoon took possession and occupation, not to speak doing so on the basis of Exhibit A. On the contrary, there is a sharp contention whether Mr. Bahsoon came to live in Bolling Street before the making of the sale agreement (Exhibit A) or after on the basis of the agreement; and, also, whether at the time Mr. Bahsoon came to live there, Mr. Sesay and his family were living there.

It has been said on several occasions that it is not enough for a trial Court to simply recount the evidence and abruptly come to conclusions on the facts particularly if based on the tenuous statement that ***"I believe this or that"; or that "I believe or disbelieve"*** a witness without any or proper analysis or evaluation of the factual evidence and therefrom make findings of primary facts upon which the relevant law can properly be applied. The legal principles or issues involved cannot stand independently of the foundational facts; they depend on their practical applicability on the particular findings of fact. For instance, in the issue of the grant of specific performance the trial judge needed to make findings of fact, for example, whether there was a contract or not; and if there was a contract, whether Mr. Bahsoon had discharged his obligations under the contract and, if not, was he willing and able to discharge his obligations. Fundamental to any sale contract is the payment of the purchase price and, in the instant case, so also is the time frame within which payment was to be effected. In my view, the trial Judge did not make any unequivocal findings of fact whether Mr. Bahsoon did make the alleged payments to Mr. Sesay as evidenced in the receipts prepared by Mr. I.B. Kamara, an erstwhile employee of Mr. Sesay; and whether as a matter of fact the employee was authorized to issue the receipts and to receive one of the alleged payments. These alleged payments are a matter of serious contention between the parties and the trial Judge ought to have evaluated all the evidence pertaining to the alleged payments before making a finding of fact whether the payments were actually made or not; and if made to whom and on whose behalf. The trial Judge, in my view, failed to do this. The trial Judge limited herself to recounting the evidence as illustrated by the narration of the evidence of Mr. I.B. Kamara (Pw2) (See Page 91).

It seems to me that the trial Judge did not make proper use of her advantage of having seen and heard the witnesses. Therefore the appellate Court is in as good a position to evaluate the evidence. As for documentary evidence an appellate court is generally equally positioned to evaluate the evidence and come to its own conclusions. See Watts (or Thomas) v Thomas 1947 All E.R. 582. The facts surrounding the receipts (Exhibits B,C, and D) alleged to have

been authorized by Mr. Sesay create doubt in my mind about the veracity of that allegation. It is commonly agreed that Mr. Sesay is an illiterate (see p. 25 line 10-11 of the record) but can sign documents in his name. It is commonly known, and it stands to reason, that illiterates, especially illiterate business people, learn to sign their name so that they can execute documents by their hand. This was the case in respect of the sale agreement (exhibit A). No explanation was given why the receipts that were supposed to have been prepared at different times by Mr. I.B. Kamara (P.W.2) were not handed over for signature by Mr. Sesay in his hand. This could easily have been done. Mr. I.B. Kamara gave evidence that he was present when the 1st two payments were allegedly made (see p 29 line 13 – 15 of the record). The receipts, as with the sale agreement, merited the signature of Mr. Sesay. Secondly, the receipts followed one another serially and all three were undated. If the receipt book was used generally for Mr. Sesay, one would expect intervening payments for Mr. Sesay. According to Mr. I.B. Kamara (Pw2), Mr. Bahsoon made the first two payments before the sale agreement was made (see p 3 lines 21 -26 of the record) but Mr. Bahsoon seems to be saying he did not make any payment on or before the execution of the sale agreement in contravention of clause one. Mr. Bahsoon said that one of the first two payments was by cheque. This was not so stated in the receipts and, more importantly, Mr. Bahsoon failed to adduce evidence of the cheque, the counter-foil or, even better, production of the cheque (or a copy thereof) in evidence by the Bank which would have been extremely useful in determining whether payments were made to Mr. Sesay or not pursuant to the sale agreement. Mr. Bahsoon in these words.

> *"I have never transferred money to Alhaji Sesay except for this transaction through his manager".*

seems to be saying he had never paid money to Alhaji except in this sale transaction and that the payments were done through Mr. I.B. Kamara (Pw2). On the issue of the receipts Mr. I.B. Kamara played a significant role. Here was a man (a relation to and brought up by Mr. Sesay, who, subsequently employed and housed him), who unceremoniously left his house and employment without informing his benefactor and employer. Such behaviour does not

engender trust or credibility. I find him untrustworthy and his evidence in support of Mr. Bahsoon's claim unreliable in all the circumstances. In the premises, I find that Mr. Sesay never received the payments represented in the receipts (Exhibits B, C and D) and that he never authorized the preparation and issuance of the receipts.

There are factors pertaining to the evidence relating to the land at Bolling Street that seriously undermine the reliability of the evidence adduced in support of Mr. Bahsoon's case. The evidence of Mr. Bahsoon was that when he moved into the property at Bolling Street, it was unoccupied and that Mr. Sesay's family came in sometime later at the request of Mr. Sesay. This is contradicted by the evidence of Mr. Sesay (see p 42 lines 23-27 of the record) when he stated that he invited the plaintiff to buy 4C portion of the premises if he did not want to be disturbed by the noise that his son, Ismael, was causing in the compound. This is the explanation given by Mr. Sesay for offering to sell a portion of the property to Mr. Bahsoon. There is no evidence that Mr. Sesay was offering to sell a portion to all and sundry. This version was not challenged and Mr. Bahsoon, on his part, did not explain the circumstances leading to the offer. Further, Mr. Bahsoon's own witness, I.B. Kamara (Pw2), gave evidence that Mr. Bahsoon moved into the property with the consent of Mr. Sesay. In the given circumstances, I find it reasonable to accept the evidence of Mr. Sesay on the issue. Mr. Bahsoon, in evidence, stated that the building he moved into was unfinished and that he finished the ground floor and expended about Le 40,000,000.00 to complete the ground floor. Yet the evidence of these expenditures in terms of receipts, cheques etc. or even the testimony of workers who carried out the stated works (see page 24 lines 11-16 of the Record) were not provided. This is to be contrasted with the evidence of Mr. I.B. Kamara (Pw2) whose evidence is that Mr. Sesay built 4 Bolling Street and the store (see page 30 lines 28-30 of the Record). The evidence of Mr. I.B. Kamara supports the evidence of Mr. Sesay when he stated:

"The Plaintiff (Mr. Bahsoon) occupies 4 Boling Street at the time of the contract (Exhibit A – the sale contract), the house has been completed".
(Brackets Provided)

As concerned the payment of City rates, Mr. Bahsoon had this to say:

"I started paying the City Rates when I completed the 1st Floor (ground Floor) and I was given a new number in 1990. The bill first came in the name of the owner.

The bill was first addressed to me in 1992 – 1993. When I completed the 1st floor City called at the house. I only keep the current bills but destroyed the others" (Brackets and emphases provided).

It is strange, to say the least, to destroy rate receipts for payments which are a term of the sale agreement (Exhibit A) contained in clause 3 thereof; or could the statement be a mere cover for failure (breach of agreement) by Mr. Bahsoon "to pay and discharge all rates and taxes and assessments duties imposed on the land". I am inclined to find a positive answer to the question. Again one can discern from the statement that the City Council gave a new number when Mr. Bahsoon allegedly completed the 1st Floor (ground floor) of the two storey building. The new number can only be referable to a portion of the property since it would appear the property had already been designated a city number of 4 Bolling Street, Kingtom, Freetown. This designation of a new number for the affected portion is supported by the City Rate receipts and demand note (Exhibits L^1, L^3 and L^2 respectively) which bear city number 4^B (or 4^P).

Let me touch on the question whether Mr. Bahsoon took occupation and/or possession of the ground floor on the basis of the sale agreement or on the invitation and consent of Mr. Sesay before the existence of the sale agreement (exhibit A). The sale agreement is in writing and, in my considered view, was

intended to contain all the terms. Terms as to who should pay city rates and the manner of the payment of the purchase price were expressed in exhibit A and not the matter of occupation or possession. I am of the view that if Mr. Bahsoon was already in occupation and/or possession of the property, and it was a term of the sale agreement, exhibit A ought to have expressly recognize such a salient term; and even more so if it was intended that Mr. Bahsoon should be in occupation and possession on the basis of exhibit A, it certainly ought to have been expressed explicity in exhibit A since the sale agreement was reduced in writing, that is, exhibit A. There is a presumption that exhibit A was intended to include all the terms of the contract. In my considered view, this presumption has not been rebutted. In all the circumstances, I accept the version (or evidence) of Mr. Sesay on this issue.

The issue of part performance has been unnecessarily drawn into the controversy. The term "part performance" is a term of art associated with the English statute known as the Statute of Frauds, 1677. Contracts under the purview of the Statute of Frauds must be evidenced in writing, failing which, they become unenforceable. (See section 4 of the Statute of Frauds, 1677). The nature of the evidence required to meet the requirement was not specified by the statute and as a result the Courts set down rules that the memorandum in writing, which can be one or more documents, should reflect the common features of a contract of the transaction in consideration, such as, the identity of the parties, subject matter, consideration, terms and signature. However, if the contract within the statute is not properly evidenced in writing, the contract becomes unenforceable in law but may be enforced under the doctrine of part performance since the contract is merely unenforceable and not void. The Court of Equity may enforce the contract under the doctrine of part performance following certain laid down rules or principles, namely; that the acts must be referable to the alleged contract; must be fraud to rely on the statute; must be specifically enforceable and, finally, there is proper parol evidence of the contract .

Strictly speaking, the common law principles, in particular the doctrine of part performance, were hard to justify in the face of the Statute of Frauds. The doctrines were recognized in the former provisions of the Law of Property Act, 1925. However, the law of property (Miscellaneous Provisions) Act, 1989, supplanted them and now insists such a contract must now be in writing in a single document (or incorporates by reference to other existing document(s)) all the terms the parties expressly agreed. Contracts for the sale of land entered into on or after 21st September, 1989, are required in England, under the law of property (Miscellaneous Provisions) Act, 1989, to be in writing not merely evidenced in writing) if they are to be valid. "Acts of part performance will not, as such, validate an unwritten land contract, although they may, in particular circumstances, give rise to a proprietary estoppel or a constructive trust" (emphasis provided) See Oxford Dictionary of Law, 2006, the sixth edition;

The doctrine of part performance has no relevance in this case as the defence in both the claim and counter-claim are not based on the Statute of Frauds. The pleadings contained no features or facts upon which the doctrine applies. Both the claim and counter-claim are based on a written contract (Exhibit A). An issue of an unwritten contract evidenced by the equitable principles of a memorandum in writing or acts of part performance do not arise at all. The sale agreement contains all the requisite features of a written contract. Its true that the area of land that has been contracted for sale was hotly disputed but that by itself does not detract the fact that reference to the subject matter is stated in the contract. Contesting what is meant by what is stated in the contract as the correct area of the subject matter and/or the intention of parties as regard the stated subject matter is another matter. The claim of Mr. Bahsoon is essentially based on performance of the contract. He allegedly paid a large proportion of the purchase price and when he was to pay the balance Alhaji Sesay failed or refused to accept same. On the other hand the counter-claim is essentially based on breaches of contract and recission. The position taken by Alhaji Sesay from the point of view of Mr. Bahsoon is a breach of Contract which ordinarily attracts damages. However, where the subject matter is land the court takes the view that a buyer of land is not adequately

compensated by damages, and he can therefore get on order for specific performance which is a discretionary remedy. It is in this context that Mr. Bahsoon claims for specific performance. The Defendant relied primarily on alleged breaches of contract and the identity of the area of land contracted to be sold. I have already found that there were fundamental breaches of the sale contract (Exhibit A) by the failure to pay the installments of the purchase price. The offer to pay the alleged balance (or even the entire price) is of no legal significance since the offer was made years after the time frame specified in the contract which was of the essence. I find it hard to accept the explanation given by Mr. Bahsoon for not paying the instalments before the end of the three years specified in the sale agreement in the given circumstances and the close relationship between him and Mr. Sesay, who, obviously, at the time, was not a man of straw As for the explanation for the lapse after the expiration of the three years specified in the sale contract, I find it impossible to accept for the simple reason that the excuse allegedly given by Mr. Sesay had no bearing and, clearly, was no impediment to executing a conveyance of the property. In my view that should have prompted any vigilant purchaser to legal recourse at least after a short period or reasonable period elapsed. In the circumstances, I find the delay by Mr. Bahsoon in fulfilling his obligations of paying the purchase price up to 1998 totally unreasonable and unacceptable.

There is the issue of the pleadings which, in the context of my findings, would ordinarily be otiose and need not be dealt with but for the remarkable inaction of counsel representing Mr. Sesay in the course of this case in the High Court up through the Court of Appeal to this Court. The evidence of Mr. Sesay at the trial as regards the area to be conveyed in particular is not reflected by the pleadings. In paragraph 1 of the statement of claim endorsed on the writ, it is averred that:

> *"1. By an agreement in writing dated the 15th day of December, 1991, and made between the Plaintiff (Mr. Bahsoon) and the Defendant (Mr. Sesay), the Defendant agreed to sell and the Plaintiff agreed to buy certain freehold property situate at and known as, 4,*

Bolling Street, Kingtom, together with certain appurtenances and heriditaments thereto attached at a price of Le 10,000,000-00 (Brackets Provided)

In response to paragraph 1 of the said statement of claim, it was pleaded on behalf of Mr. Sesay that:

"1. The Defendant admits paragraphs 1 and 2 of the statement of claim"

The evidence of Mr. Sesay is that the understanding (on oral agreement) he had with Mr. Bahsoon was for the conveyance of a portion of the land designated 4^C. This is notwithstanding the fact that the sale agreement (Exhibit A), by its recitals, seems to be referring to 4, Bolling Street, Kingtom, Freetown, as the subject matter of the sale. It would appear from the evidence adduced by Mr. Sesay that the balance of the property (after the sale of a portion to the Sierra Leone Government or President Siaka Stevens) was abstractly demarcated into different portions by Mr. Sesay and designated 4^A, 4^B and 4^C. This view is given credence by exhibit N which shows the property demarcated and given the said designations. The city council receipts and demand note (Exhibits L1, L3 and L2) seem to support the said view. However, what is clear from the evidence is that the said balance was not physically demarcated by boundary fences.

The admission of Mr. Sesay's evidence that was at variance with his pleadings was not, for some unfathomable reason, objected to by counsel for Mr. Bahsoon. In the same vein, at various stages in the course of the case, it was apparent, or ought to have been apparent, to counsel for Mr. Sesay, of the need to amend Mr. Sesay's pleadings to reflect his evidence and to make the necessary application even at the appeal stages. Counsel for Mr. Bahsoon at some stage of the case, in address, pointedly drew the attention of counsel for Mr. Sesay that parties are bound by their pleadings and that pleadings may be amended to conform to the evidence. Notwithstanding, and surprisingly, for some inexplicable reason, counsel failed to seek the necessary amendments.

Given the inaction by, and the attitude of, counsel for Mr. Sesay, an illiterate in the face of the evidence, I, if the need had risen, would have been inclined to treat the evidence as if Mr. Sesay had been granted leave to amend his pleadings to conform to his evidence rather that allow an illiterate, in the circumstances of this case, to suffer injustice on account of no fault of his.

The sale agreement (Exhibit A) was prepared by a legally untrained person and not by a legal practitioner. Such lay persons, in preparing legal documents, may inadvertently misrepresent the intentions of the parties concerned. Exhibit A is no exception; in fact, in my view, it's a case in point. It is clear from the evidence that the intention of the parties to the sale agreement (Exhibit A) was that if the purchase price was not paid by Mr. Bahsoon within the three years from commencement date, Mr. Sesay shall consider the sale agreement cancelled. This, in my view, means that the agreement terminated upon failure to pay the purchase price within the agreed period. In any event, by clause 4 of the sale agreement, it is Mr. Bahsoon, the purchaser, who shall consider ***"the sale cancelled and shall repossess the said premises"*** Clearly, this was not the intention of Mr. Sesay and Mr. Bahsoon. It is because of situations such as this that the Legislature in many countries pass laws prohibiting lay persons preparing legal documents.

Mr. Bahsoon brought this action on the basis of, and pursuant to, exhibit A. Under section 2 of the Registration of Instruments (Amendment) Act, 1964, this provides:

> *"2. Every deed, contract or conveyance executed after the 1st of June, 1964, shall be void, so far as regards any land to be thereby affected, unless it is registered within the appropriate period limited for such registration under the proviso to subsection (4) -----"*

exhibit A ought to have been registered. In the Western Area in which the land in issue lies the appropriate period is ten (10) days from the date of execution of the relevant document. Exhibit A was never registered and thereby became

void ten (10) days after the 15th day of December, 1990, the date of execution of exhibit A. There is no dispute that exhibit A became void immediately after the stipulated period for registering same. The difficulty regarding the position of exhibit A in respect to the claim arose from the statement of the Court of Appeal in its judgement, dated the 30th day of November, 2004, that it would not permit the Registration of Instruments (Amendment) Act, 1964, ***"to be used as an instrument of fraud"*** and borrowing the words of Lord James in Haigh v. Kaye, Law Rep 7 Ch. 469, when dealing with the Statute of Frauds, stated that the Registration of Instruments (Amendment) Act, 1964, ***"was never intended to prevent the court of equity from giving relief in a case of plain, clear and deliberate fraud".***

The problem I have with the said expressions of the Court of Appeal is that the context in which the expressions were applied in the cited cases in relation to the raising of the Statute of Frauds as a defence to claims is different, and not comparable, to the context of this case. In the case of Haigh v Kaye the Defendant admitted that no consideration for the conveyance was paid and that the agreement was for him to return the property. The Defendant then, contrary to agreement, claimed to hold the estate discharged of any trust, and claimed the benefit of the Statute of Frauds which prompted Justice James, in dealing with the objection based on the statute, to say:

> *"The defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the Statute of Frauds, and claims the estate as a right. Now the statute of frauds no doubt says, that a person claiming under any declaration of trust or confidence must shew that in writing; but the statute goes on to say that no resulting trust, and no trust arising from the operation of law, is within the enactment. I apprehend it is clear that the statute of frauds was never intended to prevent the Court of equity from giving relief in a case of a plain, clear, and deliberate fraud. The words of Lord Justice Turner in the case of Lincoln v. Wright (4De G. and J. 22), where he said, 'The*

principle of the Court is, that the statue of frauds was not made to cover fraud', express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the statute of Frauds to keep another man's property which he has obtained through fraud"

The Court of Appeal, I presume, wanted to extend and apply this principle enunciated in respect to the Statute of Frauds (which is applicable in Sierra Leone) to the Registration of Instruments (Amendment) Act, 1964. It must be noted that the objective of the Statute of Frauds was to protect owners of landed properties or estates from being defrauded on the basis of unwritten claims or evidence. The Court, in enunciating this principle, was not oblivious to the irony of allowing the very provisions of the Statute of Frauds to be used effectively in perpetrating a fraud that the statute is intended to prevent. It was this principle (and for the same purpose) that was applied by the Court in the case of In Re Duke of Marlborough. Davis v. Whitehead 1894 2 Ch.133. In this case, the widow of the Duke had lent him her property for obtaining a loan by mortgaging the property with the understanding that the property remained hers and would be re-conveyed to her in due course. The Duchess herself joined the mortgage but the equity of redemption was reserved for the Duke solely. Unfortunately, the Duke died before he could carry out the understanding of re-conveying the property. The Court rejected the view in Leman v. Whitley, 4 Russ. 423 and applied the view in Haigh v. Kaye, a more recent case and a decision by the Court of Appeal, concluded that the Duchess was entitled to the equity of redemption in the leasehold house of No. 3, Carlton Terrace, and not a lien on the house on the price as would have been the case had the view in Lemon v. Whitley been followed.

The present case, clearly, does not fall into what can be regarded as the Statute of Frauds cases. Even if the principle is made applicable to the Registration of Instruments (Amendment) Act, 1964, the party relying on the principle would have had to show the fraud it is intended to prevent. Both Mr. Sesay and Mr. Bahsoon were not representing anything other than exhibit A. There is serious

dispute as whether part payments of the price has been paid and also the dimension of the area of land to be conveyed. This is not fraud, in my understanding of the word, in the context of a statute being used to cover or perpetrate a fraud. A notable distinction between the relevant provisions of the Statute of Frauds and section 2 of the Registration of Instruments (Amendment) Act, 1964, is that the said provisions of the Statute of Frauds merely make the agreement unenforceable unless it is in writing. In this situation the agreement continues to subsist but remain unenforceable. The Court of Equity in applying the principle denies the defendant the right to rely on the provisions of the Statute of Frauds as a defence, and thereby give way to the enforceability of the statute. Without the denial, the subsisting agreement cannot be enforced by the Court. On the other hand, as regards section 2 of the Registration of Instruments (Amendment) Act, 1964, failure to register the document (agreement) within the relevant stipulated period renders the agreement ***"void"*** as opposed to ***"voidable"*** or ***"unenforceable"***. Therefore, immediately after the stipulated period for registration, exhibit A became not voidable or unenforceable but dead; and for all practical purposes, non existent. In truth, the parties had continued, erroneously, to view exhibit A as subsisting even after the elapse of the stipulated period for registration when, in fact, they were acting in a legal vacuity. I fail to see how either party can benefit under the terms of the void contract (Exhibit A). The parties can only rely and benefit from the terms of exhibit A if it can be brought back to life. It is my strongly held view that this Court is not endowed with such biblical powers; bringing the dead back to life! Assuming that this Court can revivify exhibit A, to do so would undermine the objective of the Registration of Instruments (Amendment) Act, 1964, which is to ensure that any affected deed, contract or conveyance is registered. In deed, if this Court were to assume such a power, I cannot imagine a situation in which section 2 would be enforced as, I guess, section 2 will only be brought to the notice of the Court if there is dispute concerning a particular document and one of the parties feels it to his advantage to bring to the notice of the court the non compliance with section 2. In the event a contract is declared void under section 2, it is my view that the parties ought to be returned, as much as feasible, to their original positions. In

the instant case, I hold that no part of the purchase price was paid and, therefore, there cannot be any order for a refund as would have been the case if I had held that Mr. Bahsoon did make part payments of the purchase price to Mr. Sesay.

Let, me deal briefly with the matter of the counterclaim which was dismissed by the trial Court. In the Court of Appeal the reliefs sought by Mr. Sesay were:

1. *That the judgement (of the High Court) dated the 19th day of March 2002 be set aside and jugdement entered for the defendant/appellant (Mr. Abdulai Sesay)*
2. *That the order for specific performance be set aside.*
3. *That the defendant be granted possession of the premises presently occupied by the plaintiff (Mr. Bahsoon).*

There was no specific ground of appeal in relation to the counter-claim in the Notice of Appeal to the Court of Appeal and the reliefs sought disclosed no specific relief in respect of the counter-claim except for possession of the premises then occupied by Mr. Bahsoon. Nothing was stated about grant of mesne profits or damages for trespass. At the hearing of the appeal, there was no specific argument on the question of mesne profits or damages for trespass. The Court of Appeal in the judgement, perhaps in relation to the general ground of appeal: "The decision is against the weight of the evidence" gave a short shrift to the ground of appeal by stating that the counterclaim was rightly dismissed.

The reliefs sought from this Court are even more limited than that sought from the Court of Appeal, namely:

1. *That the judgement of the Court of Appeal be set aside and one in favour of the appellant be substituted.*
2. *Any other relief this Honourable Court may deem fit.*

Here also, there is nothing specific in the reliefs sought in the counterclaim for mesne profits or damages for trespass. The same applies to the grounds of appeal; nothing specific is stated in respect of the counter-claim particularly in relation to the counter-claim for mesne profits or damages for trespass. The statement of case and address on behalf of Mr. Sesay were also devoid of specific reference to the issues of mesne profits or damages for trespass.

It seems to me that proceedings in the Court of Appeal and this Court focused on the claim; and from Mr. Sesay's perspective on getting back his property. In the premises, this Court is not inclined to make any pronouncements or orders in respect of the counter-claim for mesne profits or damages for trespass. Suffice to say that in the given evidence a claim for mesne profits is not justifiable; and even if it were, there is grossly insufficient evidence to support the claim of mesne profits of $ 1000-00 (One Thousand United States Dollars) per month. There is no evidence of rents over the relevant period for comparable properties in the vicinity or similar neighbourhoods. And since Mr. Bahsoon was not paying rent, the Court lacks any form of yard stick for measuring or calculating any mesne profits. The evidence in my view seems to indicate Mr. Emad Bahsoon as a bare licensee. The nature of that position is that when Mr. Bahsoon was served with the notice to quit (exhibit "K") he became a trespasser upon failing to vacate with "all reasonable speed". The counter-claim contains no pleading for special damages and there is no evidence to support such a claim. At best Mr. Abdulai Sesay could have only hope for general damages in respect of the trespass. As stated earlier I am not inclined to make any such order for an award of damages.

In the premises, the appeal is allowed and I make the following orders:

1. *The judgement of the Court of Appeal dated the 30th November 2004 and the judgement of the High Court dated the 19th November 2002*

are hereby set aside. The conveyance (Exhibit "J3") in respect of the property situate at 4 Bolling Street, Kingtom, Freetown, and executed in favour of Mr. Emad Bahsoon, (the Respondent) if registered, is hereby cancelled and to be expunged from the Record Book of Conveyances kept in the office of the Registrar-General, Freetown.

2. *The Registrar-General to forthwith expunge, if registered, the said conveyance from the Record Book of Conveyances kept in the office of the Registrar-General in Freetown.*

3. *Mr. Emad Bahsoon to forthwith vacate the said premises and deliver up possession of same to Mr. Abdulai Sesay (the Appellant).*

4. *If costs have been paid in the High Court and Court of Appeal by Mr. Abdulai Sesay to Mr. Emad Bahsoon same to be refunded to Mr. Abdulai Sesay. The cost of this appeal to Mr. Abdulai Sesay assessed at Le: 3,000,000 to be paid by Mr. Emad Bahsoon to Mr. Abdulai Sesay.*

HON. MR. JUSTICE G.B. SEMEGA-JANNEH – J.S.C.

I AGREE: HON. MRS. JUSTICE S. BASH-TAQI – J.S.C.

I AGREE: HON. MRS. JUSTICE V.A.D. WRIGHT – J.S.C.

I AGREE: HON. MR. JUSTICE N.C. BROWNE-MARKE – J.A.

I AGREE: HON. MR. JUSTICE E. ROBERTS – J.A.