IN THE COURT OF APPEAL OF SIERRA LEONE

CIV.APP 44/2014

BETWEEN:

OSMAN CONTEH

28 WILL STREET

FREETOWN

&

ISLAMIC AWARENESS MISSION

28 WILL STREET

FREETOWN

AND

THE MAYOR COMMUNITY AND

CITIZEN OF FREETOWN

&

ADE LEWALLY

28 BASS STREET

FREETOWN

CORAM

1. HON.MR JUSTICE SENGU M KOROMA JSC-PRESIDING
2. HON MRS JUSTICE JAMESINA E.L. KING- JA
3. HON. MR JUSTICE SULAIMAN A. BAH -JA

REPRESENTATION

HALLOWAY & PARTNERS- FOR THE APPELLANTS

GARBER &CO - FOR THE 1ST RESPONDENT

JUDGMENT DELIVERED ON THE 25TH DAY OF NOVEMBER, 20 21

JUDGMENT DELIVERED ON THE 25TH DAY OF NOVEMBER, 2021 BY THE HON.MR.JUSTICE SENGU M KOROMA JSC

1. This is an Appeal from the Judgment of Hon. Justice V.M. Solomon JA (as she then was) dated the 9th day of September, 2014 on the following grounds: -
   (a) That the Learned Trial Judge having correctly cited the "Locus classicus" case of WALSH-V-LONSDALE 21 (1882) Ch. D. 9 in setting out the case for the Plaintiff, then failed, and/or omitted and/or neglected to apply the legal principles enunciated therein, to wit:
   "That an agreement for a Lease is as good as a Lease", as was borne out by the evidence in this case, and consequently wrongly dismissed the Plaintiff's case.
   (b) That the Learned Trial Judge was totally wrong to have held that there was no evidence that the Plaintiffs had accepted the offer of a lease as contained in Exhibit "D", notwithstanding that she had before her a Survey Plan prepared by the Lessor, the Department of Surveys and Lands (now Ministry of Lands and Country Planning) in favour of the Plaintiff dated after Exhibit "D" (i.e. on the 26th August, 1994) and that she also had further documentary evidence from the Lessor as contained in Exhibit "H" dated 22nd September, 1997, and Exhibit "L" dated 2011, all of which were cast aside and the Plaintiff's claim dismissed.
   (c) That the Judgement was completely against the weight of evidence.
2. The Appellants sought the following relief:
   (a) That the Judgement of Hon. Justice V.M. Solomon JA (as she then was) dated the 25th June, 2014 BE SET ASIDE.
   (b) That Judgment be entered for the Plaintiffs as per their statement of claim dated 26th May, 2008.
   (c) That the costs of this Appeal and the action in the High Court be borne by the Respondents.

PROCEDURAL HISTORY

3. The Plaintiffs instituted proceedings in the High Court against the Defendants (Respondents herein) dated the 26th May, 2008 seeking the following relief:
    1) A Declaration that the Plaintiffs are Lessees of all that piece or parcel of Land apportioned PLOT 1 and PLOT 2 respectively on the Survey Plan dated 26th August, 1994, with the Department of Surveys and Lands (now Ministry of Lands, Housing and the Environment) as Lessor.
    2) An interim injunction restraining the Defendants, their servants, agents, workmen or howsoever from going upon, remaining and/or in any other manner dealing with the said property pending the hearing and determination of this action.
    3) Perpectual Injunction.
    4) Damages to be assessed by the Court.
    5) Costs to be assessed by the Court.
4. All of the procedural rules as provided for in the High Court Rules, 2007 were complied with and the matter was heard and determined in favour of the Respondents herein. It is against this Judgment that the Appellants have appealed to this Court on the grounds hereinbefore set out.
5. The second Respondent herein did not appear in the proceedings in the court below nor in this court.
6. I shall determine all of the grounds of Appeal together based on the submissions of each Counsel.
7. Counsel for the Appellants argues that the LTJ ignored the principle enunciated in WALSH-V-LONSDALE (supra) which is aptly applicable to the instant case and dismissed the Plaintiff's case.
8. He submits that, the rule is when there is a contract for the grant of a legal interest, equity regards that has done which ought to be done and thus treats that interest as if it has already been granted. In other words, if a tenant holds under an agreement for a lease, he does so under the same terms in equity as if the lease has been granted at law.

9. Counsel for the 1st Respondent on the other hand, argues that, even if the document is to operate as an equitable lease, applying the test in WALSH-V-LONSDALE, there is no clear evidence proffered by the Appellants of rent payments made to seal the leasehold relationship. The Building permits and other NRA receipts submitted by the Appellants lack sufficient probative value to confirm that they were making payments under the equitable lease.
10. The LTJ had this to say on this point "Though in equity the void lease is equivalent to an agreement for a lease as seen in WALSH-V-LONSDALE, a written lease exceeding three years confers an equitable lease provided that there is sufficient memorandum as required by the Law of Property Act, 1925. At Common Law, a parol lease was sufficient to create the relation of Landlord and Tenant in the case of corporeal hereditaments, and there was no necessity to employ either a deed or writing provided the lease does not exceed three years. In the instant case, the Plaintiff has not complied with this". She says further, "In the instant case, the offer of a lease is a contract subject to its acceptance and consideration, but there is no evidence of acceptance of Exhibit "D" nor can the receipt marked Exhibit "P 1" be deemed to be sufficient consideration. Even if this Court holds that the terms of the offer of the lease were accepted, no lease was prepared".
11. The LTJ held that though the Appellants may have an equitable lease, the principle in WALSH-V-LONDALE (supra) could not be applied in this case as the offer was not accepted nor was consideration provided by the Appellants.
12. With respect, I do not agree with this restrictive interpretation of the rule in WALSH-V-LANDSDALE. The rule established in the case presupposes non-compliance with strict legal rules leading to reliance on equity and so any attempt to use the former to defeat the latter would be considered non-sequitur.
13. Though the lease was not allegedly accepted and registered, the Appellants have an equitable interest by virtue of Exhibit "D". The existence of an equitable right gives rise to an equitable remedy. It is only when there is no available equitable remedy that the court

would, in its discretion refuse to enforce that right. It is the duty of the Court in the exercise of its equitable jurisdiction to make that determination.

14. SNELL, EQUITY 632-635 had this to say on this point:
"Equitable remedy" is discretionary. This discretion must not be exercised arbitrarily according to the whims of the Judge but "Judicially", according to settled principles, so that a Plaintiff could succeed in equity only if, in addition to a right having been infringed, there was no equitable principle which prevented him for being granted a remedy". I may add that judicial discretion refers to a Judge's power to make a decision based on his or her individual evaluation of evidence and guided by principles of law.

15. In the instant case, the Appellants were granted leases of two plots of land dated the 5th day of July, 1994 for an initial period of ten years with effect from the 1st July, 1994 with an option to renew for a further period of ten years. Condition No. 7 of the said letter provides that: "If you will let us have your written acceptance of the above terms and pay a year's rent, arrangement will be made for survey of the site under your name".

16. Counsel for the1st Respondent argues that the offer was not accepted by the Appellants in writing. He submits that the "lease agreement" relied upon by the Appellants was merely a letter of offer for a lease and was signed by the Director of Lands and Surveys rather than the Minister of Lands as is required for the lease of State Land to individuals. He also submits that a formal lease was never drawn up and filed with the Office of the Administrator and Registrar General in Freetown and thus the letter Offer is in violation of the Registration of Instruments Act.

17. I do not agree with the submission of Counsel for the 1st Respondent on this point. The first paragraph of the letter dated 5th July, 1994 states that: "I am directed to refer to your letter of application for State land and to convey the approval of the Hon Secretary of State, Department of Lands, Housing and the Environment for you to lease the land that you applied for under the following conditions ..."

18. It is often times the practice for civil servants to be "directed" by their Ministers to write certain official letters. Here the letter was written on the Ministry's Official Letter head with its reference number: SLD 93/45 Vol. II. The wording is instructive, '... convey the approval of the Hon. Minister..."In the absence of clear evidence that the Minister did not approve the offer, I hold that the offer was valid. This is more so when the Ministry continued to insist on putting the Appellants in possession during the tenure of successive Ministers.
19. On the issue of acceptance and registration, the subsequent letters from the Ministry to the Respondents and copied the Appellants implies there is a recognisable and enforceable agreement between them and the Appellants.
20. In those letters, the Ministry consistently reiterates its grant of leases to the Appellants and insisting that the Respondents vacate the said land. By restating the Appellants' interests after 1994 until the 2000s, is a strong implied indication that they had fulfilled all the required conditions.
21. On the issue of non-registration of a lease, I would say that the legal position is that though such a lease will be void in law, it will not necessarily be in equity. This would entail the tenant been let into possession and periodically paying rent – LAND TENURE IN SIERRA LEONE, THE LAW, DUALISM AND THE MAKING OF A LAND POLICY- Ade Renner- Thomas, Page 97. This case is, however, rather unusual in that the Appellants never entered into possession due to the action of the Respondents in spite of the best efforts of the Lessor. However, there is evidence that no rent has been owing. That notwithstanding, two important cases state the position of the law on non-registration of leases.
22. The first of these cases is WALSH-V- LONSDALE (supra).
    In determining the relevance of this case, I have set out its brief facts and the issues involved therein.

    > The Defendant Lonsdale agreed to grant the claimant, Walsh, the lease of a Mill for seven years, the rent to be paid quarterly in advance if demanded. The parties did not execute a deed for the grant of a tenancy but the claimant moved in and paid

quarterly rent in arrears. The Defendant then demanded a year's rent in advance. The claimant refused to pay.

23. The claimant argued that under the Common Law rules, a lease had to be created by deed to be legal. This had not been done; therefore, the lease was not legal.

24. The English Court of Appeal found in favour of the Defendant Landlord. Their Lordships held that "the Judicature Acts 1873-1875 had fused the separate legal systems of Common law and Equity into one system. In any conflict, the rules of equity should prevail. According to the equitable maxim' "Equity looks on as done that which ought to be done" the parties were treated as having a lease enforceable in equity from the date of the agreement to grant the lease. Such lease was held under the same terms and the Court could order specific performance. Lord Jessel stated at pages 14-15 thus:

"The Tenant holds.... under the same terms in equity as though the lease has been granted... He cannot complain of the exercise by the Landlord of the same rights as Landlord would have had if a lease has been granted".

25. It could be discerned from the facts of WALSH-V-LANSDALE that the dispute was between the Tenant and the Landlord. In the instant case, the dispute is between the Tenant and a third party who has set up a rival title to that of the landlord. That distinction notwithstanding, the principle therein applies in this case. Also, though it does not directly address the issue of non-registration, it establishes the principle governing equitable leases.

26. A more recent and impactful decision on this issue is the persuasive Australian case of IDEAL BUSINESS CENTRES ltd-V-VIOLIN HOLDINGS PROPERTY LTD (2018) NSWSC 1249. This is a decision of the Supreme Court of New South Wales. The facts of this case are that a Vendor of a commercial property, part of which has been leased to a Tenant, entered into a sale agreement with the purchaser for the purchase of that property. The lease term was for ten years but it

was unregistered. On completion of the sale, the Purchaser required the Tenant to vacate the said land on the basis that:

> "As the unregistered lease was not registered on the title to the land and is for a term in excess of 3 years, the owner is not bound by the terms of the unexpired lease".

27. The Purchaser argued that the failure to register the lease meant that the Tenant did not have indefeasible title and therefore the lease did not bind the Purchaser. The Purchaser suggested that the Tenant was merely in possession as Tenant at Will.
28. The Supreme Court of New South Wales held that the Tenant had the benefit of an in personam equity against the Purchaser, which overcomes what would otherwise be the Purchaser's indefeasible title to the property. This Judgment acts as a guide to courts in commonwealth jurisdictions when faced with the problem of determining the validity of an unregistered lease.
29. Having taken into considerations the facts of the instant case and the authorities cited herein, I hold that the Appellants have an equitable interest in the plots of land. They therefore hold "under the same terms as though the lease has been granted and registered". Having so held, I shall now proceed to another issue raised by the 1st Respondent.
30. The 1st Respondent argues that even if the lease was valid, the terms created therein had expired. It should be clarified here that the failure of the Appellants to take possession of the plots of land was due to the act of the 1st Respondent who had put other persons into possession. In its statement of Defence, paragraph 1 thereof, the 1st Respondent (then 1st Defendant) avers as follows:

> "The 1st Defendant cannot admit the allegation contained in paragraph 1 of the Plaintiffs particulars of claim save that the Defendants assert that "it is the owners of the said premises and no lease was provided by the Defendants to the Plaintiff for the said property nor was the Ministry of Lands, Housing and the Environment authorised to rent on its behalf".

31. What the 1st Respondent is seeking to establish here is that at the time the Appellants were entitled to take possession, they had a

paramount title to the property and the assertion of this title would deprive the Appellants of the use contemplated by the Parties."Paramount title" to my mind, means any legal interest in the premises that is not terminable at the will of the Landlord at the time the Tenant is entitled to take possession

32. This Defence has raised an important issue in this case viz: Whether the 1st Respondent holds a better title in the property than that of the Appellants' Lessor, the Ministry of Lands.

The Counsel for the 1st Respondent had this to say on the issue:

> "The Witness Statement and the Oral testimony of the Defendants witness, Eric Forster confirms the fact that the 1st Defendant and the Ministry were clear as to the exact boundaries of the plots which formerly belonged to and housed the Mobil Oil Company and that of the Brass Street Lorry Park".

33. He went on to comment negatively on the failure of the Appellants to adduce survey evidence. This submission is wrong and misleading as there is a Survey Plan in the Appellant (then Plaintiffs') court bundle, which sufficiently shows the Plots of land the Appellants are laying claims to.

34. The issue now turns on whether the Ministry had the right to grant the lease to the Appellants.

35. The Appellants in their Court bundle exhibit the following letters:

(a) Letter dated the 15th day of January, 1991 written by the Ministry to one Ade Lewally, the 2nd Respondent herein titled "Encroachment of State Land at Dan Street, Lorry Park Freetown" informing the 2nd Respondent that the land he was occupying was state land under lease to the 2nd Appellant.

36. In the last paragraph of the said letter, the Ministry invited the 2nd Respondent to call on the Director of Surveys and Lands and bring along his documents of title.

(b) Letter dated 30th January, 1991 reiterating the contents of the letter dated 15th day of February, 1991.

(c) Letter dated 15th February, 1991 in which it was stated that this was the final letter of invitation to the 2nd Respondent and added

that "Failure to honour this invitation will result in the Ministry taking the appropriate action to evict his "people" from the said land".

(d) Letter dated 15th September, 1995 from the Town Clerk, City Council of Freetown to the 1st Appellant informing him that from their investigation, the plots of land in question were leased to them by the Department of Lands, which is presently occupied by Traders at Brass Street.

(e) Letter dated 22nd September, 1997 from the Ministry of Lands, Housing and the Environment to the Town Clerk. Paragraphs 2, 3and 4 give a background to the ownership of the land.

Paragraph 2: "I wish to inform you that the area containing the Filling station was leased to Mobil Oil Company long before the transfer of the Brass Street Lorry Park to the City Council by Cabinet conclusion of 1st November, 1974. The Filling Station area was leased to Mobil Oil Company with effect from 1st September, 1961 for 21 years with an option to renew for 14 years. The said Company occupied the land for Eleven years and later handed over of the remainder of the term of years to the Government, In November, 1972, the lease was surrendered thereby reverting possession of the land to the Ministry of Lands".

Paragraph 3: In 1980, the Mobil Oiling Station land was leased to Ibrahim Conteh who took possession of the land until May, 1993 when the lease was terminated.

Paragraph 4: Subsequently, the said land was divided into two plots and leased to the 1st and 2nd Appellants....

The letter clarified that these pieces and parcels of land were surveyed and properly beaconed. Apparently, the Mobil Filling Station land and the Brass street Lorry Park have been and remain to be two distinct parcels of land.

37. In the said letter, the Ministry informed the City Council that they were in breach of the covenants to pay rent and use of the land for the purpose it was demised.

(f) Letter dated 16th October, 1997 from the Town Clerk, City Council of Freetown to the Director of Surveys and lands in which the Council agreed that the Mobil and the Brass Street Plots were two (2) distinct parcels of land, He informed the Ministry that the default in payment of the rent was being addressed by Council. The Town Clerk explained that though the premises were granted to the City Council for use as a Lorry park, he argued that the business of a market was incidental to the purpose of running a Lorry Park.

The Town Clerk concluded that a joint site Inspection be conducted to clarify the position of the beacons "which will help us reach an amicable conclusion", he added.

(g) Letter dated 31st may, 2000 from the Ministry to the Town Clerk complaining that the joint site visit proposed by them did not take place due to Councils failure to respond to the Ministry's letters dated 29th October, 1997 and 5th November, 1997 in that respect..

38. The exchange of communication between the 1st Respondent and the Ministry proves that the former does not have any established title to the said two plots of land as they agree that the Lorry Park and the Mobil Filling Station area are two distinct plots of Land.

39. The Ministry argues that only the Lorry Park area was leased to the 1st Respondent and that the land formerly occupied by Mobil Oil Company and the Brass Street Plots were distinct parcels of land. This was admitted by the 1st Respondent in their letter dated 16th October, 1997.

40. This is a case in which the 1st Respondent has set up a rival title to that of the Ministry. Whenever this issue arises, the burden of proof shifts to the party seeking to prove a better title. This could have been done by the 1st Respondent exhibiting the site plan showing the area Leased by them.

41. It is my conclusion on this point that the Appellants have established a better title to the two plots through their Lessor than that of the 1st Respondent. This conclusion is strengthened by the fact that the 1st Respondent does not know the nature of its interest in the plots of land; in its defence, it claims to be "fee simple" owners of the land which they clearly are not.
42. The conclusion by the LTJ that "that the latter (1st Respondent) has averred in its defence that it is the fee simple owner of the land in dispute, a fact acknowledged by the Ministry of Land, the alleged Lessor of the 1st Plaintiff (the 1st Appellant)" is not supported by evidence. I shall refer to this issue later in the Judgment.
43. On the argument that the lease period has expired, I would state that the 1st Respondent frustrated the tenancy of the Appellants. This is evident in the letter from the Town Clerk dated 15th September, 1995 in which he refused to recognise the leasehold title of the 1st Appellant and even warned him to desist from any further action that would lead to the embarrassment of "the Traders and subsequently the City Council of Freetown". This proves that the 1st Respondent had traders installed on the land effectively denying the Appellants access. It is inconceivable that any Court would accept the argument of the 1st Respondent that the action should fail because the lease has expired. It would appear that the 1st Respondent was frustrating the Appellants' effort in taking possession until the leases expired and use that as a Defence. If the lease has expired because of the action of a third party, this Court has the power, in the exercise of its discretion to order the Lessor to grant a new lease on similar terms as the previous one. When this is done, the Appellants would cease to have any cause of action against their Lessor. The reasoning for this is that, the Lessor is not in any way responsible for the difficulty faced by the Appellants to take possession. The grant of a new lease would cure any loss suffered by the Appellants.
44. I would conclude by commenting that the LTJ misapplied the principle in SEYMORE WILSON –V- MUSA ABESS (supra) thereby leading her to arrive at a wrong decision. The claim of the Appellants

in this case is for a declaration that "the Plaintiffs are Lessees of..." and not "a declaration of title". The standard required to discharge the burden of proof placed on the Plaintiff in an action for declaration of title is very high and must not be used in determining leasehold interests

45. In her Judgment, the LTJ has this to say, "It is trite law that in an action for a declaration, one stands or falls on his own documentary title. I find support for my opinion in SEYMOUR WILSON –V-MUSA ABESS where was stated that: "In a case for a declaration of title, the Plaintiff must succeed on the strength of his title. He must prove a valid title to the Land'. So if he claims fee simple title, he must prove it to entitle him to a declaration of title..."

46. Her Ladyship goes further to rely on the defence of the 1st Respondent that it is a fee simple owner of the said plots. There is no evidence of fee simple ownership of the plots by the 1st Respondent nor is there an acknowledgment of such by the Ministry of Lands. In fact, the contrary occurs. The Ministry emphasises that the 1st Respondent is its Tenant of certain pieces and parcels of land adjoining those leased to the Appellants. What is clear here is that this matter is definitely not an action for the declaration of title to land and so the dictum of Livesey-Luke CJ relied on by the LTJ in support of her opinion does not apply.

47. It is a fundamental duty of the court to restrict itself to the evidence adduced before it and evaluate the said evidence based on the law. The principle is that a court should not set up for parties a case different from that set up by them in the proceedings. Similarly, a court must confine its Judgment to the determination of issues raised in the pleadings.

48. For the reasons I have endeavoured to explain herein, I hold that the Appellants have proved that they are entitled to a declaration that they are Lessees of those pieces or parcels of land apportioned Plot 1 and Plot 2 respectively on Survey Plan dated 26th August, 1994.

49. This court shall not however award damages as claimed by the Appellants in their Writ of Summons. The reason being that the

Respondents as per this judgment would be entitled to a new tenancy on the same terms as those granted by Exhibit D. This means they would now be granted a new term of 10 years with an option to renew for a further 10 years. The consideration for this new tenancy is the payment to the Lessor of all the rent collected by the 1st Appellant for the period 1994 to date of this judgment. In such a situation, it would be unconscionable for this court to Order the Appellants to pay damages. Damages awarded in such cases are the income the Appellants would have earned if the plots of land had been leased to third parties. In this case, as I have already stated, the Lessor shall grant a new lease to the Appellants "on the same terms as those in Exhibit D".

50. In the circumstance, the Appeal is allowed and I order as follows:

1. That the Respondents shall give up possession of all those pieces and parcels of land apportioned Plot 1 and Plot 2 respectively on Survey Plan dated 26th August, 1994.
2. That the 1st Respondent gives account and pays over to the Ministry of Lands and Country Planning all rents received in respect of the said two Plots of land for the period 1st July, 1994 to the date of this Judgment.
3. That the Ministry of Lands and Country Planning immediately grants a new lease to the Appellants on the same terms as those granted by their letters dated 5th July, 1995.
4. A perpetual injunction is hereby granted restraining the Respondents any person acting on their behalf from entering into or remaining on the said two plots of land.
5. The 1st Respondent shall bear the costs of the action in this Court and in the Court below, such costs to be taxed if not agreed.

6. The Registrar of the Court of Appeal shall serve this Order on the Attorney –General and Minister of Justice and the Minister of Lands and Country Planning.

HON. MR. JUSTICE SENGU M KOROMA JSC----------

HON. MRS. JUSTICE JAMESINA E L KING JA----------

HON. MR JUSTICE SULAIMAN A BAH JA----------