

CIV.APP 29/2020

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN

DR. JOSEPH MOI & ANOR.

APPELLANTS

AND

MR. KOFFIE COLLIN MACAULEY

RESPONDENT

CORAM:

HON. MR. JUSTICE REGINALD S. FYNN J.A. (PRESIDING)

HON. MRS. JUSTICE JAMESINA E. L. KING J.A

HON. MR. JUSTICE SULAIMAN A. BAH J.A.

COUNSEL:

T. KELLY ESQ – APPELLANT

J. M. JENGO ESQ - RESPONDENT

JUDGMENT DELIVERED THIS ^h12 DAY OF JANUARY 2021

BACKGROUND

1. This matter relates to property situated at Lakka in the Western Area of the Republic of Sierra Leone. Mr. Koffie Colin Macauley, the Respondent herein who was Plaintiff in the court below, instituted an action on 9th August 2011 against Mr. Samuel Johnson (Snr) and all other trespassers unknown for a declaration that he is the fee simple owner of the said property measuring 0.9244 acres situated at Off Peninsula Circular Road Sandima Fakai, Lakka, damages for trespass, recovery of the land and other consequential reliefs stated therein. His claim was based on a Deed of Gift in his favour dated 2nd October 2007 duly registered as No. 319/2007 in Volume 107 at page 3 of the Books of Conveyances kept in the Registrar-General's Department in Freetown.
2. Appearance, defence and counterclaim were filed on behalf of the defendant Mr. Samuel Johnson. He counterclaimed for a declaration of title of the land situated at Lakka Fakai, Peninsula Road Lakka as the property of the Johnson Family based on two registered Statutory Declarations dated 11th August 1975 and 17th July 1978 respectively as set out on L.S. 897/75 covering 0.5379 acres; L.S. 894/78 covering an area of 2.307 acres; L.S. 1262/88 covering 5.5673 acres and 1.6665 acres. The defendant's counterclaim also included a claim for recovery of possession of any part of the said land occupied by the plaintiff and an order that the said conveyance of the

plaintiff be cancelled. There was no appearance or defence for any of the other unknown trespassers.

3. The Respondent herein, the plaintiff in the lower court filed a reply and defence to the defendant's counterclaim. In his defence to the counter-claim the Respondent stated inter alia that his root of title is linked to that of the Johnson family of Lakka and maintained he is a "bona fide purchaser" for value without notice.
4. Directions for trial were issued on 10th February 2012 which the parties complied with and the court bundle prepared for trial dated 10th October 2013. Trial commenced and in midstream the parties negotiated a settlement. At page 247-248 of the Court of Appeal Records, is a document dated 15th February 2019 titled minutes of consent order signed by both the plaintiff therein the Respondent herein and Samuel Johnson asserting the Respondent's ownership of the said land as per his Conveyance earlier referred to and the Respondent will pay to the defendants the sum of Le20,000,000 being the sum negotiated and agreed between the parties with respect to the settlement of the matter.
5. On 29th May 2019, a Judgment adopting the minutes of the consent judgment was adopted and delivered in favour of the Respondent herein and the court ordered that he was entitled to ownership of the said land as per his conveyance, that the defendants give up possession on the said property and the Respondent herein recovers vacant possession of the same, that he is at liberty to issue a Writ of Possession, that the Respondent pays to the Defendant the sum of Le20,000,000 being the sum negotiated and agreed between the parties with respect to the settlement of this matter and that the Defendant abandons his counter-claim in this action. This ruling was made pursuant to a Notice of Motion referred to therein and both Counsel for the parties were heard before the orders were made. A writ of possession was issued on 16th March 2020 and executed thereafter.
6. The Appellants herein, caused to be filed on their behalf an ex-parte notice of motion in the High Court dated 29th July 2020, applying for leave to issue a Summons for an order for them to be added as defendants in the action and for an interim stay of execution of the said judgment or ruling dated 29th May 2019. In the affidavit supporting the application the Appellants herein claim to be bona fide owners of a portion of the said land in dispute by virtue of a Deed of Conveyance dated 9th July 2019 purchased from the Johnson family. The Appellants further stated that at no time did the plaintiff who is the Respondent herein or his Solicitors make any attempt to bring the action to their knowledge or other parties affected, even though he was aware that they were owners of a piece of the land, and had never objected to the erection of their building, until its total completion.
7. They further complained that Samuel Johnson without their consent and that of the other joint owners /vendors purported to sign a Minutes of Consent Order on behalf of himself and all other trespassers unknown, knowing quite well that his authority in that action was limited to representing himself. According to the said affidavit, the Respondent herein filed a Writ of Execution and has claimed lands owned by third parties who have not been accorded an opportunity to defend themselves or have their title tested, neither consented or instructed Samuel Johnson to sign on their

behalf and that to allow him to continue this conduct, will in effect defeat the course of justice and the opportunity to hear from other interested parties. Pictures of the demolition of the Appellant house were exhibited and it was stated that the repairs to the same will cost the sum of Le340,000,000 (Three Hundred and Forty Million Leones).

8. On 30th July 2020 the High Court delivered a ruling granting the Appellants leave to be added as Defendants provided they can obtain an order from the Court of Appeal to reverse the order dated 29th May 2019 on terms the court may deem fit and just. In addition it was ordered that in the alternative, the Appellants are at liberty to bring an action seeking to be indemnified by the Defendant and including the Respondent therein as Defendant and that meanwhile common sense dictates that the Plaintiff herein observes a moment of cease fire until this issue is resolved on its merits to avert undesirable consequences in due course.
9. Having in effect refused their application for an interim stay, the Appellants filed an appeal to this court dated 4th August 2020 and a notice of motion dated 4th August 2020 in this Court, asking for inter alia a stay of execution of the orders of the High Court. A stay of execution was granted by this Court on 6th August 2020 pending the hearing and determination of the Appeal.
10. The Respondent gave notice of a preliminary objection to the hearing of the appeal pursuant to Rule 19 of the Court of Appeal Rules 1985 and asked the Court to strike out the Appellants appeal filed on 4th August 2020 on the grounds of non-compliance with the Court of Appeal Rules; that this court lacks jurisdiction to hear and determine same as there was no matter with the present title determined in the High Court and that the Appellant lacks locus and status to seek the reliefs prayed for in the appeal.

THE APPEAL

11. The Appellants being dissatisfied with the decision of the High Court contained in the Judgment of Hon Justice Musu D. Kamara J.A. dated 30th July 2020 has appealed to this Court upon the following grounds:

"1. Misdirection/misapplication of the law as to the exercise of the discretion conferred by [Order 18 Rule 12(3)] of the 2007 High Court Rules of Sierra Leone

a. Substantively, the Learned Judge having correctly interpreted the provisions mentioned in paragraph 1 above and accordingly granting the Applicant/Appellant leave to be added as a party to the Respondent/Respondent's action provided that the Appellant can obtain an order from the Court of Appeal to reverse the order dated 29th May 2019, then refused to grant an interim stay of the said order pending the hearing and determination of the Appellant's appeal to the Court of Appeal, thereby making the appeal otiose in the event of the Respondent executing the order made consequent upon an alleged agreement between one co-owner and the Plaintiff without any opportunity being afforded to the Appellant, described in the Plaintiff's Writ of Summons as trespassers unknown, to be added as Defendants to defend the Respondent's action. Instead the Learned Judge

offered the Appellant the alternative of liberty to bring an action seeking to be indemnified by the Defendant in the action Mr. Samuel Johnson and the Plaintiff therein without any consideration of the ability of either to indemnify the Appellants, who stood to lose property worth over \$300,000 in the event of execution of the order aforementioned.

- b. The refusal to grant an interim stay in the circumstances narrated in paragraph (a) above was an unreasonable exercise of discretion, in that the Learned Judge took no account of the effects and purport of the substantive rules, [namely rr(1), (2) and 3] of the High Court Rules 2007, or if she did, the refusal was not based on law."

12. The Appellant filed additional/supplemental grounds of appeal as follows:

"c. The Learned Judge was wrong in law to give the Respondent liberty to issue a Writ of possession to enforce the judgment appealed without any proof or evidence that the Appellants, who were in actual occupation of the whole of the land had received such notice of proceedings as appears to the court sufficient to enable them to apply to the court for any relief to which they may be entitled, as provided by Order 46 Rule 3 (3) of the High Court Rules of Sierra Leone. The error is more glaring when it is considered in paragraph 2 of the Judgment the "defendants" are enjoined to give up vacant possession of the property the subject of the dispute and that the Plaintiff recover possession, which implies that the Plaintiff or the judge or both were aware of the "persons being in actual occupation" of the land, yet permission was given to issue the Writ of Possession without any evidence that they received notice of the proceedings as required by the Rules.

d. The Learned Judge equally fell into error of law in giving the judgment on the basis of the consent of only one of four joint tenants, who, as a matter of law, could not have validly and lawfully signed away the beneficial interests of the other co-owners unless they expressly consented to his doing so, it being trite that a trust is mandatory for co-owned property with the co-owners holding the legal estate upon trust for themselves and their beneficial interest existing behind such trust. The Learned Judge had no evidence before her of the agreement of the other co-owners to Mr. Samuel Johnson the sole signatory, to disposing of their beneficial interests in the manner set out in the consent order/judgment.

e. In the premises, their Lordships are asked to reverse the judgment of Hon Justice Musu D. Kamara dated 29th May 2019 and leave given to the Appellants to defend the action in the court below."

13. It is against both court orders of 29th May 2019 and 30th July 2020 that the Appellants herein are seeking to set aside as execution of the judgment affected their property and they had no notice of the action neither were they given any opportunity to defend the same. The issue for determination is whether the Appellants are entitled to have this Court set aside both decisions of the High Court.

14. The Learned Judge considered the application of the Appellants and in consideration of the fact that that they were affected as a result of the execution of the order of the 29th May 2019 correctly exercised her discretion to add them as Defendants to defend the action. The Learned Trial Judge did not grant the application to stay execution of the said judgment. Her order for a cease fire until the issue is resolved on its merits was an attempt to maintain the status quo and an acknowledgement that there were issues that had to be resolved. The failure to stay execution of the judgment, failure to comply with the High Court Rules in the issuance of the Writ of Possession as well as granting a declaration of title of the land in dispute to the Respondent following a negotiated settlement forms the basis of the appeal and application to set aside the orders of the court.

15. On the issue that the Learned Trial Judge incorrectly exercised her discretion when she refused to grant the Appellants application for a stay of execution of her judgment, this court will refer to the settled authorities, including: *Firetex International Company Limited v Sierra Leone External Telecommunications and Sierra Leone Telecommunications Company Limited* (26 June 2003) Court of Appeal, Misc. App. 19/02 (Unreported), *Patrick Koroma v Sierra Leone Housing Corporation and Dolcis Beckley* (26th May 2004), Court of Appeal, Misc. App. 9/2004 (Unreported) and *Desmond Luke v Bank of Sierra Leone* (14th July 2004) Court of Appeal Misc. App. 22/2004 (Unreported). For a stay to succeed, the applicant must show special or exceptional circumstances that warrant a stay of execution to deprive a successful party from the fruits of his judgment. The onus is on the applicant to demonstrate that such circumstances exist in his favour. In the present case the Appellants were correctly added as Defendants as they convinced the court that they had an interest in the subject matter and had been affected by the judgment, execution of which had resulted in the demolition of their property which they occupied. Having proved to the court that they were in occupation of the land and having built a house which the Respondent had knowledge of, not having been served with the Writ or received any notice of the proceedings were all special circumstances that the Learned Judge ought to have taken into account in exercising her discretion in favour of the Appellant to grant a stay of execution of the judgment.

16. The second point of contention relates to the Writ of Possession issued and executed on behalf of the Respondent following the order of the court and the relevant ground of appeal is as follows:

"The Learned Judge was wrong in law to give the Respondent liberty to issue a Writ of possession to enforce the judgment appealed without any proof or evidence that the Appellants, who were in actual occupation of the whole of the land had received such notice of proceedings as appears to the court sufficient to enable them to apply to the court for any relief to which they may be entitled, as provided by Order 46 Rule 3 (3) of the High Court Rules of Sierra Leone. The error is more glaring when it is considered in paragraph 2 of the Judgment the "defendants" are enjoined to give up vacant possession of the property the subject of the dispute and that the Plaintiff recover possession, which implies that the Plaintiff or the judge or both were aware of the "persons being in actual occupation" of the land, yet permission was given to issue the

Writ of Possession without any evidence that they received notice of the proceedings as required by the Rules."

17. Here was a trial between two parties the Respondent herein and a Samuel Johnson. It is important to highlight that from the commencement of the action there were other persons described as "unknown trespassers" who were in occupation of the property or who had an interest in the property. Additionally, the evidence before the court was that Samuel Johnson was not the sole owner of the property as there were other members of his family who had an interest in the property and who ought to have been included in the negotiations to settle the matter and their signatures obtained which was not done.

18. There was no evidence before the court that either the other members of the Johnson Family or other persons who had an interest in and occupied the property such as the Appellants were served with any notice of the proceedings. It is now quite apparent from the evidence before the court that the Respondent herein was fully aware of the occupation of the Appellants on the said property as well as the fact that they had constructed a building on the same. Counsel for the Appellants argued that there was no evidence that the Appellants, who were in actual occupation of the land had received such notice of proceedings as appears to the court sufficient to enable them to apply to the court for any relief to which they may be entitled, as provided by Order 46 Rule 3 (3) of the High Court Rules.

19. Order 46 Rule 3 (2) & (3) of the High Court Rules states as follows:

"(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action.

(3) Such leave shall not be granted unless it is shown—

(a) that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled; .." (emphasis mine)

20. Paragraph 45/3/7 of the Supreme Court Practice at page 795 deals with similar provisions set out above and under the rubric "notice of proceedings", it states that:

"Where the defendant is the only person in possession of the premises the plaintiff must give the defendant notice of the judgment or order, and call upon him to give up possession under the judgment or order. Where there are other persons (not parties to the proceedings) in actual possession it is also necessary to serve them with such written notice as will give them a reasonable opportunity of applying to the Court".

Having regard to the above provisions of the Rules and in view of the fact that there were other persons on the land as stated in the Writ who were defendants and described as "Trespassers unknown", the court ought to have taken steps to ensure that all occupants of the land had notice of the proceedings prior to the issuance and execution of a Writ of Possession. Clearly the Learned Trial Judge's failure to ensure that the requisite notice was given as required in Order 46 Rule 3 (3) erred in law and this deprived the Appellants who

were in possession of the land and who had erected a property thereon from applying to the court for relief.

21. It is the opinion of this Court that the negotiated settlement by the parties contained in the minutes of consent judgment did not take away the rights of persons in occupation to have notice of the proceedings, and this is so particularly when the Appellants who were in occupation never took part in the proceedings or the settlement leading to the judgment. There is nothing to show that the Appellants as defendants (described as other trespassers unknown) were served with the Writ of Summons or any of the proceedings and it is trite law that proceedings taken in default can always be set aside *ex debito justitiae* (as of right) or on proof of good grounds to set aside the judgment obtained in default. (See Orders 13 Rule 9 and 22 Rule 11 of the High Court Rules) There is also no evidence that the Appellants received notice of the proceedings which they were entitled to under Order 46 Rule 3(3) which is a mandatory provision for the protection of all occupiers of the property which is subject to execution of a judgment for possession.

22. The principle for the requirement of notice of proceedings granting leave to issue a writ of possession to enforce a judgment was clearly endorsed in the case of *Minet v Johnson* (1886-90) All ER at page 587. In that case a person who was in possession of a premises who had no knowledge of the proceedings and did not claim to occupy it through the defendant who had allowed judgment to go by default, on application by the person in possession, the Writ of Summons and all subsequent proceedings were set aside for irregularity and an order made for restoration of the person evicted. The principle was followed in *Leicester v Permanent Building Society v Shearley* (1950) 2 All E.R., 738. Order 18 Rule 12 (1) of the High Court Rules gives discretion to the Court at any stage of the proceedings in an action for possession of land, to order any person not a party to the action who is in possession of the land (whether in actual possession or by a tenant) to be added as a defendant. This provision was correctly applied by the Learned Trial Judge in this case when on an application by the Appellants herein she added them as Defendants but she erred in failing to grant a stay of the judgment or allowing the newly added Defendants to defend the action.

23. The other grounds of appeal can be summarized as follows; firstly whether the Learned Trial Judge ought to have proceeded to grant the declaration of title in favour of the Respondent when it was obvious that the consent judgment adopted was flawed as it was signed by Samuel Johnson (SNR) when he was only one of several co-owners, and he could not have signed on behalf of his co-owners and even the unknown trespassers. This court will say no more on this. Suffice it to state that these are the issues in controversy that will have to be determined at a trial.

24. The preliminary objection of the Respondent herein is overruled for the reasons set out above and in the interest of justice. This Court invokes its powers conferred on this court by the provisions of Rule 31 and Rule 32 to hear and determine this appeal. Rule 31 & 32 provide as follows:

"31. The Court may from time to time make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of

appeal, and may direct the Court below to enquire into and certify its findings on any question which the Court thinks fit to determine before final judgment in the appeal, and may make any interim order or grant any injunction which the Court below is authorised to make or grant and may direct any necessary enquiries or accounts to be made or taken and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance, and may rehear the whole case, or remit it to the Court below to be reheard, or to be otherwise dealt with as the Court may direct.

32. The Court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision."

25. Having held that the Writ of Possession as well as its execution were in breach of the High Court Rules cited above, and amounted to grave miscarriage of justice that resulted in severe loss to the Appellants, the question is what redress is the Appellant entitled to? There is clearly a dispute among the parties relating to declaration of title, trespass etc. which cannot be determined in this Court particularly so when the matter did not go through a full trial and judgment was delivered on account of an agreement which the Appellant was not a party to. This case was instituted in 2011, regrettably it has been pending since then, notwithstanding the delay, under the powers conferred on this Court by Rule 31 of the Court of Appeal Rules the interest of justice will be served for the matter to be remitted to the Court below for trial so that the parties and all those affected may have an opportunity to present their case and the matter determined at a trial. The co-operation of both counsel in addressing the issues relating to the security of the property and ensuring that the stay of execution is complied with is appreciated and commendable. The appeal of the Appellant succeeds and this court makes the following orders:

1. That the Judgment of 29th May 2019 and the order of 30th July 2020 are set aside and the action is remitted to the Court below for trial with the Appellants and all persons in occupation of the property be joined as parties, served and be allowed to defend the action.
2. The Appellants are to be restored to the premises and should be compensated by the Respondent and Samuel Johnson (SNR) for the loss occasioned as a result of the execution of the Writ of Possession. Compensation may be agreed on by the parties or claimed at the trial.
3. Costs of this appeal be borne by the Respondent to be taxed if not agreed.

HON. MRS. JUSTICE JAMESINA E. L. KING J.A

HON. MR. JUSTICE REGINALD S. FYNN J.A. (PRESIDING) I AGREE

HON. MR. JUSTICE SULAIMAN A. BAH J.A.

I AGREE