

CIV. APP. 64/2017 AND CIV. APP. 21/2018

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

CIV. APP 64/2017

ALIMAMY IBRAHIM SESAY - APPELLANTS

AND

MADAM YABOMWARA KAMARA – RESPONDENT

BETWEEN

CIV. APP. 21/2018

MADAM YABOMWARA KAMARA - APPELLANT

AND

IBRAHIM SESAY - RESPONDENT

CORAM:

HON. MRS. JUSTICE JAMESINA E. L. KING J.A (PRESIDING)

HON. MR. JUSTICE ANSUMANA I. SESAY J.A

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

COUNSEL:

G. Conteh Esq. for Alimamy Ibrahim Sesay Appellant/Respondent

S.M. Sesay Esq for Madam Yabomwara Kamara Respondent/Appellant

**JUDGMENT DELIVERED THIS 20<sup>TH</sup> DAY OF OCTOBER 2022**

**Civ. App 64/2017**

In this matter there are two appeals. In Civ. App. 64/2017 the Appellants are Alimamy Ibrahim Sesay and Yabom Posseh Sesay and the Respondent is Madam Yabomwara Kamara. The Notice of Appeal is at page 395 -396 of the records. This Appeal is against the whole of the Judgment of Justice Komba K. Kamanda

J. (as he then was) dated 11<sup>th</sup> August 2017 and the grounds of appeal are as follows: -

1. That the Learned Trial Judge acted on the wrong principles of law in refusing the application for a stay of the Judgment in Default by the Defendants.
2. That the Learned Trial Judge failed to consider the ownership of the property as against the Plaintiff and the Freetown City Council, Lessor to the Defendants.
3. That the refusal of the Order sought by the Defendants is against the weight of the affidavit evidence.

The relief sought is for the Order dated 11<sup>th</sup> August, 2017 to be set aside. The order of 11<sup>th</sup> August 2017 refused the application for a stay of execution of the Judgment dated 24<sup>th</sup> April 2017 and for leave to file a defence out of time.

#### **The second appeal – Civ. App. 21/2018**

The second appeal is Civ. App 21/2018 and the Amended Notice of Appeal is at page 434 – 438 of the records of appeal dated 19<sup>th</sup> October 2018 after an order to amend of 18<sup>th</sup> October 2018. The Appellant is Madam Yabomwara Kamara and the Respondent is Ibrahim Sesay.

This appeal is against the whole of the Judgment of Hon. Mrs. Justice Adelaide O. Dworzak J. dated 14<sup>th</sup> March 2018 and the grounds of appeal are as follows:

1. The Learned Trial Judge failed to consider adequately or at all the Appellant's Affidavit in Opposition to the Purported Application that was before her.
2. That the issues raised in the Respondent's undated Application of 2018 had been litigated upon by a Court of Competent Jurisdiction between the same parties in a matter that was before the same High Court intitled C.C. 7/17 K No. 1. Between Madam Yabomwara Kamara – Plaintiff and Ibrahim Sesay – Defendant.
3. That the issues adjudicated upon in the Respondent's action that was before the Trial Judge the Hon. Mrs. Justice Adelaide O. Dworzak judge were res judicata.
4. That the procedure adopted by the Respondent to relitigate issues that had been litigated upon between the same parties by a court of competent jurisdiction was wrong in law.



5. That the Purported Originating Summons in the matter leading up to the Judgment of 24<sup>th</sup> March 2018 was never issued as the same was not sealed with the seal of the High Court as required by law nor was it ever an Originating Summons according to law.
6. That the Learned Trial Judge erred in law in holding that the Land the subject matter of a previous judgment of the High Court in the matter intitled C.C. 7/17 K No. 1. Between Madam Yabomwara Kamara – Plaintiff and Ibrahim Sesay – Defendant leading to the Judgment of the Hon. Mr. Justice Alhaji Momoh Jah Stevens, the same dated 24<sup>th</sup> April 2017 [is] separate and distinct from the land delineated on Survey Plan numbered LS5841/14 dated 9<sup>th</sup> May 2015 based on the evidence of the Respondent's Surveyor only.
7. The Learned Trial Judge proceeded on the wrong procedure in adjudicating on an action for title to land and thereby erred in law in holding that the execution done for the Respondent pursuant to the Judgment of the High Court dated 24<sup>th</sup> April 2017 in respect of the same res in this matter was wrongful.
8. The Learned Trial Judge proceeded to assess damages in the matter that was before her when there was not sufficient evidence before her to do so.
9. The Learned Trial Judge proceeded to determine this matter without allowing the Appellant to put her case before the Court in breach of a fundamental principle of natural justice to wit:- audi altarem partem.
10. That the Judgment dated 14<sup>th</sup> day of March 2018 cannot be supported having regard to the evidence that was before the Court.
11. That the Respondent ought not to have the issues relitigated by the same High Court of concurrent jurisdiction having regard to the Judgment of 24<sup>th</sup> April 2017 in the manner before the same High Court.

The reliefs sought by the Appellant Madam Yabomwara Kamara from this Court are:

1. That the Judgment of the Hon. Mrs. Justice Adelaide O. Dworzak J. dated 14<sup>th</sup> March 2018 be set aside and the Appellant appeal upheld and Judgment entered for the Appellant in this Appeal.
2. That this Honourable Court do make an Order that the Appellant be restored into possession of all that piece or parcel of land situate lying and being at New Freetown Waterloo Road Freetown, the same as



demarcated on Survey Plan Numbered LOA 2116 dated 19<sup>th</sup> day of January 2002.

Alternatively

3. This Honourable Court do make an Order directed at the Undersheriff to restore the Appellant into possession of her said land situate at New Freetown Waterloo Road Freetown.

## **Background**

### **Civ. App. 64/2017**

This appeal emanated from a judgment in respect of a Writ of Summons C.C. 7/17 instituted by Madam Yabomwara Kamara dated 12<sup>th</sup> January 2017 in which she prayed for a declaration, against Ibrahim Sesay and Yabom Posseh jointly and severally for a declaration of title for all that the piece or parcel of land situate lying and being at Freetown Waterloo Road, Freetown, as per Conveyance registered as Volume 551 page 117 No. 340/2002, shown in Survey Plan SLS No. 38/90 dated 8<sup>th</sup> January 2002 and other related reliefs. In her particulars she stated that she is the fee simple owner and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Ibrahim Sesay and Yabom Posseh, continued to trespass and commits acts inconsistent with the fee simple and despite warnings they have continued to trespass and occupy the land.

She obtained judgment in default on a motion for Judgment on 24<sup>th</sup> April 2017, (at pages 356 – 358) delivered by Hon. Mr. Justice Alhaji Momoh Jah Stevens J. (as he then was), declaring her as the fee simple owner of 93 Bai Bureh Road Kissy, Freetown measuring an area 0.1055 acre on survey plan dated 8<sup>th</sup> January 2002 between the Government of Sierra Leone and herself registered as No.240/2002 at page 117 Volume 551 of the Book of Voluntary Conveyances kept in the Office of the Registrar-General in Freetown. The said Judgment was subsequently duly executed.

This appeal, Civ. App. 64/17 is by the Appellant Ibrahim Sesay against the refusal by Hon Justice Komba Kamanda J. (as he then was) to grant a stay of execution the said Judgment of 24<sup>th</sup> April 2017 by Justice Stevens and for a defence to be filed out of time. There are two similar Motions for setting aside the Judgment dated 20<sup>th</sup> July 2017 and 1<sup>st</sup> November 2017 filed by C.F. Edwards Esq and Betts & Berewa respectively.

There is also a previous Writ C.C. 275/16 between Madam Yabomwara Kamara as Plaintiff and Alimamy Ibrahim Sesay and Yabom Posseh Sesay as Defendants,



same parties for the same reliefs as claimed in C.C. 7/17. An appearance and Defence were filed to this Writ. In their Defence both 1<sup>st</sup> & 2<sup>nd</sup> Defendants in the High Court who are husband and wife (now Appellant in this Appeal) denied trespass on the Plaintiff's land, averred that both lands are distinct from each other, and that they were granted state land from the Ministry of Lands for which they are paying lease/rent up to date. In reply the Plaintiff who is the Respondent averred that the land is part of the Estate of Madam Yabomwara Kamara granted to her by the Ministry of Lands and is still paying lease/rent up to date to the Freetown City Council. On 25<sup>th</sup> January 2017, the action in C.C. 275/16 was discontinued by Madam Yabomwara Kamara the Respondent.

### **Civ. App 21/2018**

The second appeal Civ. App 21/2018, is between Madam Yabomwara Kamara as Appellant and Ibrahim Sesay as the Respondent and against the Judgment of Hon. Mrs. Justice Dworzak J.

In addition to the two actions by Writs (C.C.7/17 & C.C. 275/16) referred to above, both instituted by Madam Yabomwara Kamara, there is a third action in the High Court instituted by Ibrahim Sesay relating to the same dispute in relation to the same land for the alleged wrongful or unlawful execution of the Judgment of Justice Stevens. It is Misc. App 37/18 2018 at page 156, and is an originating summons instituted by Ibrahim Sesay as Plaintiff against Madam Yabomwara Kamara and the Undersheriff as Defendants, asking the Court pursuant to Order 5 Rule 4(2) of the High Court Rules to determine that Madam Yabomwara Kamara's land demarcated on Survey Plan dated 8<sup>th</sup> January 2002 is separate and distinct from the Plaintiff's land Ibrahim Sesay as demarcated in Survey Plan dated 9<sup>th</sup> May 2014 leased to him by Freetown City Council, and to declare that execution carried out against Mr. Sesay, the Plaintiff was unlawful and for consequential orders.

In his affidavit Ibrahim Sesay stated that the property of Madam Yabomwara Kamara, the subject matter of C.C. 7/17 K. No.1 was separate and distinct from his, and that execution carried out by the Undersheriff was wrongful. Judgment was delivered in favour of Ibrahim Sesay by the Hon. Mrs. Justice Adelaide Dworzak J on 14<sup>th</sup> March 2018 granting the reliefs prayed for.

Ostensibly, this action by Ibrahim Sesay was instituted as a response to the Default Judgment obtained in C.C.7/17 and the refusal by Justice Komba Kamanda to set it aside and grant him leave to defend the action. I will say more



about this line of action taken, which is clearly an abuse of the court process. The Originating Summons is dated 22<sup>nd</sup> January 2018. An affidavit in opposition was filed to the Summons and the Learned Trial Judge Mrs. Justice Adelaide Dworzak J. delivered judgment in favour of Ibrahim Sesay and granted the consequential orders sought. A stay of execution of this judgment was granted pending the appeal.

### Analysis and Decision

This is a very simple matter made very convoluted in its presentation and as a result of the several interlocutory applications filed in the High Court as well as in this Court. They accounted for a lot of delay in hearing the substantive appeals. Both Counsel filed synopsis and made oral submissions to the court. It is regrettable that since 2016 to date litigation ensued between the parties in several different actions all related to the same dispute over the same property. In spite of the multiplicity of actions and applications by both parties the Judgments obtained by the respective parties never emanated from a full trial, one was obtained by default and the second was contrary to the Rules, as it was instituted by a mode of action not appropriate for contentious actions. The different Solicitors involved should share the blame.

The documents disclose that this is a dispute over ownership of land, apparently originally belonging to the Government of Sierra Leone and both parties claim to have had leases over their respective properties and were paying rents. Madam Yabomwara Kamara has obtained a freehold from the Government and Mr. Ibrahim Sesay still has a lease as the various documents filed disclose.

Madam Yabomwara Kamara instituted an action in 2016 for a declaration of title and trespass against Ibrahim Sesay and his wife. This action was discontinued after the Defendants filed a defence and Plaintiff filed a reply. Discontinuance was not in accordance with the High Court Rules. Prior to discontinuance Madam Yabomwara instituted another action in 2017 for the same reliefs against the same parties. In default of defence this second action of 2017 proceeded to Judgment on 24<sup>th</sup> April 2017 on a motion for judgment. The application for a stay of this Judgment was refused by Hon. Justice Kamanda on 11<sup>th</sup> August 2017 and the said judgment was executed against Ibrahim Sesay.

It is not in dispute that there has not been a judgment on the merits after both sides have been heard. The High Court Rules 2007 (See Orders 13 Rule 9 and Order 22 Rule 11) and case law and authorities abound that a judgment obtained



by default either regularly or irregularly, is one which the courts always have a discretion to set aside. In this case, the affidavit in support of the application to set aside the judgment and for leave to defend sworn to by Ibrahim Sesay did state that the Writ was never served and Counsel also pointed to the absence of an affidavit of service of the Writ. Admittedly the purported affidavit of service was of service of a notice of intention to institute proceedings and not an affidavit of service of the Writ. Thus obtaining a judgment in default where there has been a failure to personally serve the writ is irregular and not in compliance with the said Rules. The judgment ought to have been set aside in the circumstances and leave given to defend the action. See *Alpine Bulk Transport Co. Inc vs. Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyds Law Report p. 221, *Evans vs. Bartlam (HL)* [1937]. There is therefore merit in ground one of the appeal in Civ. App. 64/2017.

Civ. App 21/18

After the refusal to stay or set aside the Judgment, on 22<sup>nd</sup> January 2018 an action was instituted by Ibrahim Sesay against Madam Yabomwara for a determination of the issue that the lands of both parties are separate and distinct. This clearly was res judicata as there was a judgment even though a default judgment regarding the same subject matter and issues. This was also an abuse of the court process. Clearly this matter had never had a full trial and looking at the records more particularly the title deeds and lease it was, and is still necessary for the issues in controversy between the parties which is ownership relating to their piece or parcel of land apparently originally owned by the same predecessor in title, the Government of Sierra Leone should be heard and determined in a full trial.

Furthermore, with a full trial, the exact location of the property ought to be properly identified and determined as Madam Yabomwara Kamara's document states the location of the property to be Freetown Waterloo Road in the Writ and her conveyance, however, when execution was levied it was levied against her and the occupants at No.23D Bai Bureh Road by Saint Helena. See the order of Mrs. Justice Adelaide Dworzak J of 16<sup>th</sup> March 2018 at page 289 of the records which granted leave to Ibrahim Sesay to issue a Writ of Possession and Writ of Fieri Facias combined. However, Ibrahim Sesay's land as claimed in his Suvey Plan was stated to be located at Bai Bureh Road see page 108 of the records. This raises serious issues germane to the identity, ownership and location of the properties.



Having had a judgment against him and execution levied, Ibrahim Sesay ought to have appealed to this Court against the refusal of a stay and refusal to set aside the default judgment which he has now done, instead of instituting a second action in the High Court.

The second action was an abuse of the process not only because the judgment was subsisting but also because the mode of instituting the action was most inappropriate as the matter between the parties was contentious. Ibrahim Sesay instituted the Originating Summons under Order 5 Rule 4 (2) of the High Court Rules. In the said Rules, Originating Summons are appropriate in proceedings where the sole or principal question is or likely to be one of construction of an enactment or of any deed, will etc. or where there is unlikely to be any substantial dispute of facts. In other words, this mode of action is not appropriate in contentious cases where the facts are disputed as we find in this case instituted by Ibrahim Sesay. See *Aiah Momoh vs Samuel Nyandemoh* unreported Supreme Court decision.

Additionally, the Learned Trial Judge who heard the application on the Originating Summons erred when she proceeded to determine the matter being aware that a judgment had been obtained by the other party. She had no jurisdiction to determine a matter in respect of the land in dispute which a court of co-equal or concurrent jurisdiction had pronounced a judgment albeit a default judgment. There is therefore merit in grounds 4 and 11 of Civ. App. 21/2018.

## **Conclusion**

As the matter stands there is still an issue in controversy between the parties that has not got the benefit of a trial giving each side an opportunity to present their case and test the evidence through cross-examination. Setting aside that Judgment and granting leave to appeal would have certainly forestalled the Originating Summons action by Ibrahim Sesay and the judgment therefrom which created more confusion and injustice to the parties.

I wonder the colossal sums of money expended by the parties as a result of the multiplicity of actions and applications filed and the unjustifiable waste of the courts time and resources. This is to be condemned in no uncertain terms. I find it most inappropriate to make pronouncement on the issues raised in the submissions by both counsel on the issues of final or interlocutory judgment, res judicata etc as the position of this court is clear that the controversy between



the parties should be remitted to the High Court for trial on the merits as per the Writ C.C. 7/17.

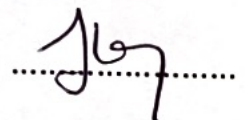
This Court cannot support the action and judgment obtained by the Originating Summons instituted and the same and all proceedings thereto ought to be set aside. I note that Madam Yabomwara is seeking to be restored into possession of all that piece or parcel of land situate lying and being at New Freetown Waterloo Road Freetown, the same as demarcated on Survey Plan Numbered LOA 2116 dated 19<sup>th</sup> day of January 2002.

All actions taken in execution of both judgments should be reversed and the status quo ante that is prior to the Writ of 2017 ~~Writ~~ be restored. Both parties should be in the same position they were before the first action was instituted. Both Counsel are urged to proceed expeditiously to ensure that this matter proceeds to trial.

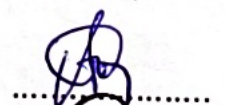
In the result, both appeals succeed. In respect of Civ. App. 64/17 the appeal succeeds on ground one (1). In respect of Civ. App. 21/18 the appeal succeeds on grounds four (4) and eleven (11). This Court makes the following orders:

1. The respective judgments and orders and all subsequent proceedings in C.C. 7/17 and Misc. App 39/18 respectively are set aside in particular the Judgment of Justice Momoh Jah Stevens dated 24<sup>th</sup> April 2017, the Order of Justice Komba Kamanda dated 11<sup>th</sup> August 2017 and the Judgment of Justice Adelaide Dworzak dated 14<sup>th</sup> March 2018.
2. Leave is granted to Alimamy Sesay and Yabom Posseh Sesay to file a Defence within 14 days of this order and defend the action in C.C. 7/17 and the matter shall proceed to trial on its merits in accordance with the High Court Rules 2007.
3. The Originating Summons in Misc. App 39/18 is struck out.
4. Each party to bear the costs of their appeal as well as costs already incurred in the High Court.

HON. MRS. JUSTICE JAMESINA E. L. KING J.A. (PRESIDING)



HON. MR. ANSUMANA I. SESAY I AGREE



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

