CC445/2021 2021 K. N0.70

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Abdul Karim Kamara & Others - Plaintiffs/Applicants

And

Issa Koroma and Others - Defendants/Respondents

Counsel: A. Boyzie Kamara, Esq.

Ruling on an Application to Enter a Judgment in Default of Appearance in Circumstances in which the very Writ of Summons, Commencing the Action, was Issued and Served in Contradistinction to Specific Provisions of the Substantive Law (Sections 18 and 21 and the Third Schedule of the Courts Act N0.31 of 1965 and Subsection (1) Through (5) of Section 15 of Act N0.10 of 2011.

1.1 Introduction

This ruling is in respect of an application, regarding a judgment in default of appearance, filed by A. Boyzie Kamara Esq. concerning all that piece and parcel of land and hereditaments situate, lying and being at Fabaina Road, Ngarahun-Crossing Village in the Koya Rural Port Loko District in the Northern Province of the Republic of Sierra Leone as delineated and described on survey plan marked MLS 32001/2019 dated the 8th day of December 2016, attached to a Deed of Conveyance dated the 15th day of July, 2019 and duly registered as N0.1362/2019,

in volume 831, at page 118 of the Records Book of Conveyances kept in the Office of the Administrator and Registrar General, Freetown. The affidavit supporting the application (made by a notice of motion) was sworn to, on 19th April 2022, by I. Richard Conteh, a Solicitor's Clerk and Process Server attached to the Law Firm, Enor and Partners.

Essentially, there is no issue of procedural inexactitude in the contents of the application. That is, procedurally, the application is made in tandem with the provisions in the High Court Rules, Constitutional Instrument N0.8 of 2007 (hereinafter referred to as the HCR, 2007). Analytically, when the writ of summons was issued by the Office of the Master and Registrar of the High Court of Justice and served on the respective Defendants in this action, they were obliged to have entered appearance within fourteen (14) days, to respond to the averments in the writ of summons, commencing the action (see the requisite provisions in Order 12 of the HCR, 2007). Nonetheless, there is no documentation on record, depicting that the Defendants did that. Thus, it was against this backdrop, that A. Boyzie Kamara Esq. deemed it procedurally congruent, to make the application in respect of a judgment in default of appearance; as clearly enshrined in the HCR, 2007.

Thus, it should be borne in mind, that even if this Honourable Court considers it relevant to make an order in respect of the judgment in default of appearance, it can be set aside as of right; in circumstances wherein the proceedings, resulting in the default judgment are in contravention of the rules; but it can as well be set aside on terms, in circumstances wherein the rules are strictso senso complied with. Meanwhile, the foregoing analytical exposition is bolstered by Buckley. L. J. in Hamp-Adams **v**. Hall (1911) 2 K.B 94**,** when he stated 'where a plaintiff proceeds by

default every step in the proceedings must strictly comply with the rules; that is a matter of strictisisima juris'. Moreover, there are a plethora of decided cases in our jurisdiction, providing succour for this rule of adjectival law. The cases of Evens **v.** Bartlam (1937) 2 All E R 646, UKHL J0430-1, SLOF **v.** Pyne-Bailey (1974) SLSC 1, Yemen Company Limited **v.** Wilkins (1950-1956) ALR S.L Series (Civil Case N0.193/54) and Alexander Korda Film Production Limited **v.** Columbia Pictures Corporation Limited (1946) 2 All E.R 424, are clearly instructive on this rule of law. However, notwithstanding the fact that procedurally, this Honourable Court is obliged to grant the application, there are a number of issues, which are cognate with this matter, that clearly contravene some provisions in the substantive law.

The first issue (that is cognate with the substantive law) that should be examined to determine whether the application should or should not be granted concerns the jurisdiction of the High Court of Justice of Sierra Leone. Significantly, sections 132 and 134 of the Constitution of Sierra Leone, Act N0.6 of 1991 (hereinafter referred to as Act N0.6 of 1991), enunciate the original exclusive, appellate and supervisory jurisdiction of the High Court of Justice. Thus, section 21 of the Courts Act N0. 31 of 1965 (hereinafter referred as Act N0.31 of 1965) also touches and concerns the jurisdiction of Sierra Leone's High Court of Justice. This later provision articulates the court's overwhelming civil jurisdiction; and the surrounding circumstances in which that jurisdiction is circumscribed. Circumspectly, the said section 21 has to be read in tandem with section 18 of the same statute. Thus, whereas section 18 focuses on the unlimited jurisdiction of the High Court of Justice, subject to certain exceptions, section 21 clarifies some of those exceptions, in the exercise of its original exclusive jurisdiction, relating to customary law (which by its very nature and structure has restrictive applicability in Sierra Leone).

Further, the Third Schedule of Act N0.31 of 1965, articulates a plethora of thematic issues, from which many civil disputes may arise, that shall never be presided over by any Magistrate Court in Sierra Leone. In effect, that schedule clearly explicates the original exclusive jurisdiction of the High Court of Justice as generically stated in section 132 of Act N0.6 of 1991. So, the Third Schedule of Act N0.31 of 1965, has to be read in tandem with particularly subsection (1) of section 132 of Act N0.6 of 1991. Thus, an indisputable construction of section 21 of Act N0.31 of 1965 is that the High Court of Justice, does not have original exclusive jurisdiction to preside over specific matters, relative to the determination of title to land situated in the provinces, other than the title to a leasehold granted under the Provinces Land Act, Cap. 122 of the Laws of Sierra Leone, 1960; neither can it establish the existence or dissolution of any marriage contracted in accordance with customary law; or any claim, relating to any marriage governed by customary law; nor can it determine the administration of estates of deceased persons, where such administration is governed by customary law. Also, issues of jurisdiction of the Local Court, are articulated in subsection (1) through (5) of the Local Court N0.10 of 2011 (hereinafter referred to as Act N0. 10 of 2011), which repealed and replaced the Local Court N0.20 of 1963. Invariably, section 15 of Act N0.10 of 2011, has also been read, consonant with sections 18 and 21 of Act N0. 31 of 1965. The principal thrust of section 15 of Act N0.10 of 2011 is that, the jurisdiction to hear and determine matters, involving a question of title to land in the provinces, is expressly vested in the Local Courts, as part of their general jurisdiction, to hear and determine all civil cases, governed by customary law.

Essentially, the above interpretation, resonates with Sierra Leone's Superior Court of Judicature's articulation of the issue of whether the High Court of Justice has

jurisdiction to preside over matters of declaration of title to land in the provinces in Caulker **v.** Kangama (S.C Civil Appeal 2/74, Judgment delivered on 18th June, 1975 Unreported). In this locus classicus, Cole C. J. affirmed the indisputable legal position, rationalised in the above provisions, that the High Court of Justice has no jurisdiction, to preside over matters relative to declaration of titles to land under customary law. Meanwhile, the trial from which this appeal arose was thus declared a nullity. Therefore, on the basis of this decision, the decision in Sitia Tribal Authority **v.** Official Administrator of Intestate Estates (1937-47) A.L.R 411, is as inapplicable herein as the decision in Kamanda Bonga **v.** F.S. Macauley (1932) 1 W.A.C.A., 225. Analytically, this is what the Hon. Dr. Justice Ade Renner-Thomas, C. J in his Land Tenure in Sierra Leone (2010:31) had to say on this issue:

> The effect of this exclusion is that the role of the superior courts in the settlement of disputes involving question of title to land held under customary tenure in the provinces is restricted to that of review on appeal. Since the bulk of land disputes that arise in the provinces revolve around a question of title, this is a very significant limitation. The High Court has whenever possible, sought to justify its right to hear and determine land disputes, in its original jurisdiction, by making a distinction between matters which merely touch and concern title to land, those which actually involve a declaration of title, or a determination of ownership, simpliciter, and are therefore excluded from its original jurisdiction under the provisions of section 21 of the Courts Act 1965.

Thus, the above analysis resonates with the Court of Appeals' decision in Marie Kargbo (As Administrator of the Estate of Pa Murray (Moray) Kargbo **v.** Saio Turay,

The Paramount Chief of Nongowa Chiefdom (Kenema District), The Presiding Magistrate (Kenema) and Ahmed Younes (Civ. App. 14/2006), which is also another locus classicus on how the Superior Court of Judicature, has handled the clear distinction between matters, concerning declaration of title to land in the provinces, and other matters, relating to recovery of possession, cancellation of lease, cancellation of deed of assignments etc. Meanwhile, it is rationally expedient to put the claims, which the Plaintiff/Applicant has raised in the writ of summons, dated 22nd October 2022, into context to determine whether this Honourable Court, should or should not grant the reliefs (as prayed on the face of the notice of motion) dated 19th April, 2022:

1. A declaration that the Plaintiffs and their organisation are jointly and/or severally the owners and persons entitled to all that piece and parcel of land and hereditaments situate, lying and being at Fabaina Road, Ngarahun-Crossing Village in the Koya Rural Port Loko District in the Northern Province of the Republic of Sierra Leone as delineated and described on survey plan marked MLS 32001/2019 dated the 8th day of December 2016, attached to a Deed of Conveyance dated the 15th day of July, 2019 and duly registered as N0.1362/2019, in volume 831, at page 118 of the Records Book of Conveyances kept in the Office of the Administrator and Registrar General, Freetown. The affidavit supporting the application (made by a notice of motion) was sworn to, on 19th April 2022, by I. Richard Conteh, a Solicitor's Clerk and Process Server attached to the Law Firm Enor and Partners.
2. Immediate recovery of possession of that piece or parcel of land and hereditaments situate, lying and being at Fabaina Road, Ngarahun-Crossing

Village in the Koya Rural Port Loko District in the Northern Province of the Republic of Sierra Leone.

3. A perpetual Injunction restraining the Defendants whether by themselves, their servants, agents, privies, workmen or howsoever called from entering, remaining upon, selling, leasing, mortgaging or renting any portion or the whole of the said piece or parcel of land and hereditaments.
4. Damages for trespass
5. Special Damages in the sum of Le 234, 000, 000.00
6. Any further or other relief (s) that this Honourable Court may deem fit and just.
7. Costs.

Significantly, a perusal of the aforementioned reliefs, depicts that the principal order, which the Plaintiff/Applicant has clamoured for, swirls around declaration of title to property. This area of Sierra Leone's civil law is compounded by the fact that the country's land tenure system is characterised by a somewhat complex binary, relative to land ownership in the Western Area and the Provinces. Unlike in the provinces, where the questions relating to ownership of land, are determined by the local court, pursuant to the customary law of the very chiefdom, where a particular piece of land (realty) is located (see sections 18 and 21 of Act N0.31 of 1965); questions relating to the determination of the ownership of a realty in the Western Area, falls within the purview of the original exclusive jurisdiction of the High Court of Justice (see the Third Schedule of Act N0.31 of 1965). Thus, the realty which is being claimed in this matter is located in Port Loko District, found in the Norther Province of the Republic of Sierra Leone. Meanwhile, sections 18 and 21 and the Third Schedule of Act N0.31 of 1965, preclude the High Court of Justice, in

its original jurisdiction, from determining the declaration of title to any realty in the provinces. This presupposes that this Honourable Court is forbidden from granting the main relief, which the Plaintiff/Applicant has sought in this application.

Moreover, the other reliefs (recovery of possession, injunction, damages for trespass, special damages and cost) are very much cognate with the first (declaration of title to realty in the provinces), which cannot be granted in this instant case. Thus, it logically follows, that the foregoing reliefs, which are undoubtedly contingent on declaration of title, can as well not be granted, because this Honourable Court, does not have jurisdiction to grant them in this instant case. Nonetheless, the procedural issues that suddenly emerge at this stage are whether, it is procedurally expedient for the writ of summons to be amended, pursuant to Order 23 of the HCR, 2007 and whether Order 2 of same, can be reasonably invoked to save this action. Essentially, I must state that neither Order 23 (concerning amendments) nor Order 2 (regarding effect of non-compliance with the rules) can be relied on to save the writ of summons, commencing this action, from being relegated to the doldrums. This reasoning is bolstered by the fact that, the issues surrounding the application, are purely jurisdictional.

And jurisdictional issues are the structural architecture, upon which judicial functionality is built. Thus, in matters wherein jurisdictional issues emerge, the courts are bound to address them, before they are even obliged to proceed with such matters, should it turn out that the courts really have jurisdiction to preside over them. However, when courts are faced with matters for which they do not have any jurisdiction, they immediately become functus in the determinations of such matters. Meanwhile, it has already been established that this Honourable

Court lacks jurisdiction to preside over this matter. This explicitly means that this action should be instantaneously dismissed on jurisdictional grounds. However, to stretch the analysis to the procedural realm, in search of further justification, concerning why should this matter be dismissed, this Honourable Court relies on Order 17 of the HCR 2007, which deals with issues, germane to disposal of actions on points of law. This order directs Judges of the High Court of Justice, to dispose of any case (including that which concerns a declaration of title to property) on a point of law. Thus, Order 17 Rule 1 Subrule (1) reads:

> **'This court may on the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that-(a) the question is suitable for determination without a full trial of the action (b) the determination will finally determine the matter subject only to any possible appeal of the entire cause or matter or any claim or issue in the entire cause or matter'**.

Analytically, it is fair and just to infer, from the aforementioned provision, that the said subrule (1) is entirely directory (is not mandatory). This interpretation is strengthened by virtue of the semantic value of the auxiliary verb 'may'; as used in the context. Second, the disposal of any matter on a point of law can be done, pursuant to an application, made by either of the parties to a litigation; or by the court on its own volition. Third, in circumstances where the court is bound to deal with the construction of any document, it can at any stage of the proceedings do so, where it is inter alia satisfied, that such task can be done, without any need for a trial. However, the court is mandated not to determine such a question, unless

the parties have had an opportunity of being heard on that question; or consented to an order or Judgment on the determination {see Subrules (3) and (4) of Rule 1 of Order 17 of the HCR, 2007}. Thus, it is clear that the other party has not made any application for this matter to be disposed of on a point of law. Of course, they would not have done so, because they did not enter an appearance in this action. Nonetheless, this Honourable Court, on its own volition, has deemed it procedurally appropriate to determine this matter on the point of law, explicated in the foregoing analysis. I therefore, dismiss this matter first on the jurisdictional issues articulated above and secondly, on the basis of the provision of Order 17 Rule 1 Subrule 1 of the HCR, 2007. I so order.

The Hon. Dr. Justice Abou B. M. Binneh-Kamara, J.

16/2022

Justice of the Superior Court of Judicature

of the Republic of Sierra Leone