CC.165/18 2018 C. No. 6

In The High Court of Justice of Sierra Leone

(General Civil Division)

Between:

Mrs. Margaret Cozier

(By Her Lawful Attorney

Charles Adenor Nicol) **- Plaintiff**

No. 23 Bombay Street

Freetown

And

Ibrahim Kamara

Block 5 Prisons Quarter **- 1st Defendant**

Brookfields

Ayo Thomas

Off Peninsular Road **- 2nd Defendant**

Marjay Town

Freetown

Oseh Thomas

Off Peninsular Road **-3rd Defendant**

Marjay Town

Freetown

M. M. Tejan for the Plaintiff/Applicant Esq.

A. Boyzie- Kamara for the 1st Defendant/Respondent Esq.

Ruling on an Application for an Order of an Interlocutory Injunction, Delivered on Wednesday, 22nd January, 2020, by Hon. Dr. Justice A. Binneh-Kamara, J.

This is a ruling, consequent on an application by way of a notice of motion, dated the 22nd day of October, 2018, for an order of interim injunction, interlocutory injunction, cost and any other order that this Honourable Court deems just and appropriate to grant to the Plaintiff/Applicant (hereinafter referred to as the Applicant) in this action. The application is made pursuant to Sub rules (1) and (2) of Rule 1 of Order 35 of the High Court Rules, Constitutional Instrument No. 25 of 2007 (hereinafter referred to as the High Court Rules, 2007).

As required by Sub rule (4) of Rule 1 of the same Order, the application is supported by the requisite affidavit of Mrs. Margret Cozier as an affiant. Nevertheless, as directed by Sub rule (6) of Rule 1 of the same Order, the application is as well opposed by a number of facts in the affidavit, deposed to by Ibrahim Kamara (the 1st Defendant in this action, hereinafter referred to as the 1st Respondent). Procedurally, the application and the opposition thereto, are filed with the requisite exactitude, dictated by the High Court Rules, 2007.

Consequently, no issue of procedural incongruity (irregularity) is raised by counsel for the Respondent (A. Boyzie-Kamara Esq.) on the methodological approach, pursuant to which the jurisdiction of this Honourable Court has been invoked, for the orders as prayed for on the face of the motion. However, counsel raised three (3) fundamental objections, bolstered by the following protestations, to support his opposition to the contents of the application:

1. The Applicant has not indicated the capacity, pursuant to which she has instituted this action. Thus, the action is unequivocally brought in a representative capacity. But the Applicant has not produced any evidence to this Honourable Court that she is suing in a representative capacity as an attorney. This has to be proven by the requisite power of Attorney, which is not available in the court's

records. This is so fatal that it deprives the Applicant of the locus standi to proceed with this or any application, before this Honourable Court. Sub rule (1) of Rule 11 of Order 31 is instructive on this.

2. The notice of motion is devoid of the certificates, certifying the exhibits that accompanied it.
3. The Applicant has not made any undertaking of damages to be paid to the 1st Respondent, should it turn out that at the end of the trial final judgment is entered in his favour, after an injunction might have been ordered by this Honourable Court; restraining him from doing anything with the real property in dispute, which is presently in his possession

Consequently, M. M. Tejan Esq., in reply, cautioned that it would be unjust and unreasonable of this Honourable Court, should it accede (concede) to the aforementioned objections, by refusing to grant the orders as prayed for on the face of the notice of motion. Nonetheless, counsel sequentially replied to the aforesaid objections with the following argumentations:

1. The point that the Attorney of the Applicant has failed to produce the Power of Attorney in respect of his locus standi and capacity in this matter is neither based on any subsisting fact, nor does it have

any legs to stand on. Counsel alludes to the affidavit in reply to the affidavit in opposition. Relying on Order 35 Rule 1, counsel submits that the motion papers are supported by the affidavit in reply to the affidavit in opposition, sworn to by the Applicant via her Attorney on the 15th day of November, 2018. Alas! Attached to the said affidavit are exhibits. And one such exhibit is that which is marked "CAN7", which is the power of Attorney, which Margaret Cozier had issued to Charles Adenor Nicol, prior to the commencement of this action.

2. The point that the notice of motion is devoid of the certificates, certifying the exhibits that accompanied it, is of no moment before this Honourable Court. Counsel submits that every exhibit in his application is introduced by the requisite certificate that is accordingly commissioned and signed. Counsel urged the Bench to go through the documents in the file to ascertain the veracity of his submission.

3. There is no rule of law which requires an Applicant that seeks for an order of injunction to make an undertaking for damages on the face of the motion papers. Counsel for the Applicant, relies on Order 35 Rule 9, in justification of this submission in contravention of Counsel for the 1st Respondent's third objection, regarding the reason why the application, should not be granted.

Meanwhile, notwithstanding the seemingly convincing legal argumentations canvassed by both counsels, the position of the law concerning the circumstances in which an injunction should or should not be granted is well established in a plethora of legal authorities that dovetail with the principal sources of law in Sierra Leone. Nevertheless, at this stage, it is legally expedient for me to lucidly and judiciously examine the factual substance of the argumentations of both counsels, before any attempt is made to determine why an order for an injunction should or should not be granted in this particular case.

To start with, the 1st Respondent's counsel's submission that the Applicant has not indicated the capacity, pursuant to which she has instituted this action, is unsupported by the available evidence before this Honourable Court. It is trite law that every affidavit that accompanies any pre-trial motion that is heard by a Judge in Chambers or in Court is considered an Evidence- in- Chief, because it is undoubtedly of evidential value. This legal position is bolstered by Order 31 of the High Court Rules, 2007. That Order concerns itself with the paraphernalia of affidavits that the Superior Court of Judicature, will indubitably consider to be of evidential value in the determination of applications for interim, interlocutory and final (perpetual) orders.

Moreover, it is also trite law that the veracity of facts deposed to in an affidavit can be ascertained via a rigorous cross-examination of the affiant of that affidavit. Even though an affidavit is expected to contain only facts that the affiant must prove, affidavits that are meant for interlocutory proceedings, may even contain beliefs that are based on reasonable grounds. Purposefully, Sub rules (1) and (2) of Rule 5 of the same Order 31 is instructive on this. Essentially, Counsel for the Applicant's affidavit in reply to the affidavit in opposition, sworn to and dated 15th November, 2018, which contains a number of exhibits accordingly attached thereto, is obviously of evidential value. And nothing stops Counsel for the 1st Respondent to ascertain the veracity of its contents.

Interestingly, the veracity of the contents of the said affidavit has not been challenged. So, its evidential value at this stage, is very much crucial to the determination of this interlocutory application. Considering the fact that the affidavit of 15th November, 2018 and its exhibits, are a constituent part of the evidence that is presently before this Honourable Court, it would therefore be unthinkable, unreasonable and unfair to conclude that the Applicant, who is the affiant to the said affidavit, has not indicated to this court the capacity in which this action is instituted.

Exhibit "CAN 7" is the Power of Attorney, indicating and confirming the representative capacity, in which Charles Adenor Nicol, instituted this action as an Attorney, on behalf of Ms. Margaret Cozier (the principal). Therefore, circumspectly, the first objection which the opposing counsel raised in justification of why an order of injunction should not be granted on this matter is a misnomer; and unfounded in the light of the incontrovertible evidence available to this Honourable Court.

Moreover, the point that the notice of motion is devoid of the certificates (Counsel for the 1st Respondent's second protestation), certifying the exhibits that accompanied it, is as well unsubstantiated by the available evidence. Meanwhile, I will uphold Counsel for the Applicant's submission that every exhibit in his application is introduced by the requisite certificate that is accordingly commissioned and signed.

Leaf 5 of the notice of motion shows the 1st certificate, introducing the 1st exhibit. Leaf 10 ascertains the 2nd certificate, depicting the 2nd exhibit. Leaf 14 indicates the 3rd certificate, introducing the 3rd exhibit. Leaf 7 pinpoints the 4th certificate, manifesting the 4th exhibit. Leaf 20 establishes the 5th certificate, justifying the 5th exhibit. Leaf 23 exposes the 6th certificate, representing the 6th exhibit.

Nevertheless, I will give credence to Counsel for the 1st Respondent's argumentation that the Applicant has not made any undertaking of

damages to be paid to the 1st Respondent, should it turn out that at the end of the trial, final judgment is entered in his favour, if an injunction is ordered, by this Honourable Court; restraining him from doing anything with the real property in dispute that is already in his possession. This argumentation is incisively authenticated by Sub rules (1) and (2) of Rule 9 of Order 35. Analytically, it will be rationally and legally expedient to set out the said provisions in full for a critical textual deconstruction in the context of the application that this Honourable Court is obliged to determine. The provisions thus read:

> Where an application is made under rules (1) and (2), the court shall require, before making an order that the applicant shall give an undertaking to the person opposing the application to pay damages that person may suffer as a result of the grant of the application if it turns out in the end that the applicant was not entitled to the order. The giving of an undertaking required under sub rule (1) shall be a pre-condition to the making of any order under rules 1 and 2.

Legal textual analysis, which is an exercise in legal communications, presupposes a disinterested or an impartial deconstruction of legal texts for their unequivocal and appropriate legal meanings. In this context, I am faced with the judicial task of deconstructing a seemingly ambiguous

legal text for the precise meanings that must inform my ruling on this application. Moreover, the deconstruction of Sub rules (1) and (2) of Rule 9 of Order 35, with the appropriate lucidity and precision, depicts the fulfilment of certain fundamental pre-conditions that must guide and guard the High Court of Justice in the determination of the applications for the awards of interlocutory injunctions, pursuant to Sub rules (1) and (2) of Rule 1 of Order 35.

First, the court is obliged (before making an order for injunction) to compel the Applicant to make an undertaking. Second, the undertaking takes the form of a payment of damages by the Applicant. Third, the damages are to be only paid to the person opposing the application (the Respondent), should it transpire that the order ought not to have been granted in favour of the Applicant. Fourth, the said undertaking is a pre-requisite for every order (of the High Court of Justice) made pursuant to Rules (1) and (2) of Order 35.

Significantly, the first question that is to be determined at this stage is whether the Applicant has complied with the paraphernalia contemplated in Sub rules (1) and (2) of Rule 9 of Order 35. The second question that is to be determined is what should be the Court's position in circumstances, wherein the Applicant has not stricto-senso complied with the dictates of Sub rules (1) and (2) of Rule 9 of Order 35.

Analytically, a critical examination of the affidavit in support of the application, dated the 22nd October, 2018, depicts that the Applicant (deponent) to that affidavit did not make any undertaking of damages, which is a fundamental pre-requisite for the determination of whether an injunction should or should not be granted.

However, should this Honourable Court turn down this application because the Applicant has neglected to make an undertaking of damages? There are a plethora of decided cases in and out of our jurisdiction that do not support an affirmative answer to this question. In light of the persuasive existing authorities on this area of the law, the question can best be answered in the negative. Of the plethora of subsisting authorities rooted in case law, I am inclined to allude to the cases of **American Cyanamid Co v Ethicon Ltd (1975) 1 All ER pages 504-512; and Chambers v Kamara (CC. 798/06 2009 SLHC 7 13th February, 2009) (An Unreported Sierra Leonean Authority).**

Meanwhile, the American Cyanamid case (a British authority) is said to be the locus classicus on the determination of the circumstances in which a court of competent jurisdiction should or should not grant an order of interlocutory injunction, which is characteristically discretionary and temporary. It is discretionary because it falls within the unfettered statutory powers of the Superior Court of Judicature to grant or not to

grant it; and it is temporary because, it does not subsist beyond the period for which the trial must last.

However, the House of Lords (Viscount Dilhorne, Cross of Chelsea, Salmon and Edmund Davies), were in agreement with Lord Diplock, when he held thus:

> The object of an injunction is to protect the Plaintiff against injury by violation of his right to which he could adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiff's need for such protection must be weighed against the corresponding right of the Defendant to be protected against injury from his being prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking if the uncertainty were resolved in the Defendant's favour at the trial. The Court must weigh one need against another and determine where the balance of convenience lies.

Inferentially, it is discernible in the foregoing pronouncement of Lord Diplock in the aforementioned case and the ratio decidendi of the same authority that the following are the essential criteria, which must guide

the Courts in their determination of whether an interlocutory injunction should or should not be granted:

1. The Courts must establish whether there is a serious question of law to be tried; and it would not be necessary for the Applicant to establish a prima facie case at the stage when the application is made, but the claim (upon which the application is based) must neither be frivolous, nor vexatious.
2. The Courts must also establish the adequacy of damages as a remedy, should it turn out at the end of the trial that, the injunction (if granted) ought not to have been granted.
3. They Courts must finally determine whether the balance of convenience is located in maintaining the status quo or not.

Meanwhile, adoptively and circumspectly, Desmond B. Edwards, J. (as he then was), applied the aforesaid criteria in Chambers v Kamara (CC. 798/06 2009 SLHC 7 13th February, 2009), to grant an interlocutory injunctive order in favour of the Applicant. However, I am quintessentially obliged to justify my decision to grant or not to grant the application, by applying the facts deposed to in the affidavits (in support and in opposition). In doing so, my first task is to establish whether there is a serious question of law to be tried.

My reading of the affidavits in support and in opposition, depicts that both parties (the Applicant and Respondent) are laying claim to a property whose ownership is now in dispute. This inference is clearly rationalised in paragraph 10 of the 1st Respondent's affidavit in opposition that it is the Applicant (who is the Plaintiff in this action) that is trespassing on his property, which the Applicant is also laying claim to. This essentially points to the extent to which it cannot be controverted that there is a serious question of law to be tried in this matter. And the question who is the owner of the fee simple absolute in possession?

Nonetheless, it is for this Honourable Court to establish (in the light of the available evidence) who is the actual holder of the fee simple absolute in possession. But, this will only be possible when the trial shall have come to its logical end. However, should the order prayed for be denied, that would turn out to be advantageous for the 1st Respondent that is now constructing a structure on the realty. Conversely, if the order is granted, that would turn out to be disadvantageous for him. But does the justice of a property that is in dispute require a claimant of that property to have a quiet enjoyment of it at the detriment of another claimant, while the court has not yet determined the actual holder of the fee simple absolute in possession?

A just, reasonable and a fair-minded tribunal of facts will audaciously answer the question in the negative. Still on the first criterion, it should be noted that it would not be necessary for the Applicant to establish a prima facie case at the stage when the application is made, but the claim (upon which the application is based) must neither be frivolous, nor vexatious. Analytically, it is quite incisive and conclusive at this stage that the Applicant's case is neither frivolous nor vexatious; he is of the conviction (just as the 1st Respondent) that the realty in question belongs to him.

Meanwhile, my second task is to establish the adequacy of damages in the context of the application. In other words, should the award of damages be considered an appropriate remedy if an injunctive order is at this stage made against the 1st Respondent, who is already in possession of the 'res' for which the parties are before this Honourable Court? Circumspectly, I will answer the question in the affirmative; and simultaneously indicate that even though the Applicant has not made an undertaking for damages, the Honourable Court, will certainly compel him to so, as that is what Sub rules (1) and (2) of Rule 9 of Order 35 procedurally require.

Finally, in consonance with the third criterion, I will say the balance of convenience (for purposes of the application) does not lie in the

maintenance of the status quo, because the 1st Respondent is currently constructing a structure on the same piece and parcel of land that is also being claimed by the Applicant. Alas! The balance of convenience is accordingly located in that sphere which prevents either of the parties from having unhindered access to the realty until this matter is determined.

Against this backdrop, I shall make the following orders:

1. That this Honourable Court hereby grants an interlocutory injunction restraining the 1st Respondent herein whether by himself, servants, agents, workmen or employees or howsoever called from entering, remaining upon, selling, leasing, mortgaging, or renting any portion or the whole of that piece and parcel of land situated, lying and being at Off Peninsular Road Gbendembu Marjay Town, Goderich, Freetown (The Subject Matter of This Action).
2. That Counsel for the Applicant shall make an undertaking for damages in compliance of Sub rules (1) and (2) of Rule 9 of Order 35 of the High Court Rules, 2007.
3. That an affidavit be filed within seven days of this order to establish compliance of Order two (2) above.

4. That Counsel for the Applicant shall pay a cost of Five Hundred Thousand Leones (Le 500.000) to Counsel for the Respondent for non-compliance of Sub rules (1) and (2) of Rule 9 of Order 35 of the High Court Rules, 2007.

Hon. Dr. Justice A. Binneh- Kamara,