C.C. 529/06 2006 D No 16

IN THE HIGH COURT OF SIERRA LEONE

CIVIL DIVISION

BETWEEN:

DR MICHAEL E M DUMBUYA - PLAINTIFF
(AS ADMINISTRATOR OF
THE ESTATE OF PA MOMODU MANSARAY)

AND

PA MOMODU CONTEH - 1ST DEFENDANT
F S CONTEH 2ND DEFENDANT

CORAM:
BEFORE THE HONOURABLE MR JUSTICE N C ROWNE-MARKE
JUSTICE OF THE SUPREME COURT
JUDGMENT DELIVERED THE 17 DAY OF SEPTEMBER, 2020

COUNSEL:
J B JENKINS-JOHNSTON ESQ (now deceased) for the Plaintiff
E E C SHEARS-MOSES ESQ for the Defendants

THE ACTION

1. The action herein was commenced by way of writ of summons issued on 9 May, 2006. It was brought by Dr Michael Dumbuya in his capacity as Administrator of the estate of Pa Momodu Mansaray, the deceased intestate, who died intestate in Kamakwie, Northern Province of Sierra Leone on 1 January, 2001. Letters of Administration in respect of the deceased intestate's estate were granted by the High Court to the Plaintiff on 19 January, 2004.
2. The Plaintiff claims that by an agreement in writing dated 10 September, 1997, the deceased intestate agreed with the 1st Defendant as follows: "*.....to pledge my dwelling-house situate at No 8 Kambia Road, Kamakwie to Mr Momodu Conteh of the same address hereinafter called the Mortgagee for the sum of Le1m for indefinite time of redemption fo the said house....*" The deceased intestate died on 1 January, 2001 without repaying the loan. On 27 December, 2004, the Plaintiff addressed a letter to Paramount Chief Kande Luseni III of Sella Limba Chiefdom,

stating that the loan would be repaid. There was an attempt to repay the loan, but the attempt was rebuffed by the Defendants. The Plaintiff's Solicitors addressed a letter to the Defendants, demanding the return of the property, but this demand was also rebuffed. The Plaintiff therefore avers that the beneficiaries of the estate of the deceased intestate have been unlawfully deprived of the said property. The Plaintiff therefore prayed for the immediate recovery of possession of the said property; and other order the Court may deem just, and the Costs of the action.

DEFENDANTS' DEFENCE AND COUNTERCLAIM

3. Appearance was entered on behalf of both Defendants on 29 September, 2006. On 3 October, 2006, the Defendants filed and served a lengthy defence and counter claim. In it, they aver that the deceased intestate increased his indebtedness to the 1st defendant by an additional sum of Le500,000. He was unable to repay the total sum of Le1.5m and therefore decided to sell the property to the 2nd Defendant for the sum of Le8m. A receipt dated 29 September, 2000 was issued to the 2nd Defendant by the deceased intestate. The receipt was witnessed by PC Kandeh Luseni III and by A I Sesay esq, then a practising lawyer, now a Justice of Appeal. The 2nd Defendant averred that after he had made the payment stated above, the deceased intestate executed a deed of conveyance in his favour, and the same was duly registered. The estate of the deceased intestate was not therefore seised of, or, otherwise well and sufficiently entitled to possession of the property at Kamakwie Road. The Defendants therefore prayed by way of their Counterclaim, that this Court make a declaration of title to the said property in favour of the 2nd Defendant.

REPLY AND DEFENCE TO COUNTERCLAIM

4. On 6 December, 2006, the Plaintiff filed a very robust Reply and Defence to Counterclaim. First, the Plaintiff denied the sale of the said property to 2nd Defendant. He averred further that this would not have been possible as the deed the 2nd Defendant was referring to was dated 31 December, 2001, whilst the deceased intestate had died on 1 January,2001. Further, the Plaintiff averred that the land was family land, and could not have been lawfully sold by the deceased intestate to third parties. He invoked the Nemo Dat Quod Non Habet principle. In the premises, the 2nd Defendant was not entitled to a declaration in his favour. The action was entered for trial the same day.

DIRECTIONS GIVEN

5. On 26 March, 2007, on a summons for directions pursuant to the then Order XXB rule 1 of the High Court Rules as amended, HALLOWAY, J gave directions for the future conduct of the action. Nothing further happened until 2009, save for the lodging of the Court Bundle 31 March, 2008.
6. By way of notice dated 5 May, 2009 the Plaintiff sought further directions from the Court so as to add to the Bundle, amended Letters of Administration originally granted on 19 January, 2004, but re-sworn and resealed on 6 April, 2009. The value of the estate of the deceased intestate was re-sworn to Le15m, and not Nil, as in the first grant. The property declared was the one in contention in these proceedings.

DEFENDANTS' APPLICATION FOR DISMISSAL OF ACTION ON POINT OF LAW

7. By way of Notice of Motion filed on 26 October, 2009, the Defendants applied to this Court for the disposal of the action on a point of law: that by virtue of section 21(a)(i) of the Courts' Act, 1965 as amended, this Court had no jurisdiction to determine the action herein. That Application was dismissed with Costs on 3 December,2009.

SHEARS-MOSES & CO REPLACE M S TURAY & ASSOCIATES

8. On 13 April, 2010, Shears-Moses & Co replaced M S Turay & Associates as Solicitors for the 2nd Defendant. On 22 June, 2010, the 2nd Defendant through his new Solicitors, applied to this Court for an amendment to the Defendants' Defence and Counterclaim. The amendments sought were to paragraphs 2, 9, 12 and 13 of the Defendants' Defence and Counterclaim, and to paragraph 1 of the prayer: The new paragraph 1 read: "*A declaration that the grant of letters of administration be declared null and void.*" Paragraph 2 of the body of the body of the pleading was amended to read: "*The grant of letters of administration to the Plaintiff was invalid and denies him the right to claim any part of the estate of Momodu Mansaray, deceased.*" The 2nd Defendant also applied to amend his list of witnesses. Leave was granted to the 2nd Defendant to amend his pleading and his list of witnesses by this Court.

COURT PROCEEDINGS

9. The case file was first assigned to C L TAYLOR, J and it came up before her on 12 December, 2006. It was then assigned to HALLOWAY, J as of 16 March, 2007. As I have said above HALLOWAY,J gave directions for the future conduct of the case on 26 March, 2007. Nothing further happened before HALLOWAY,J. On 4 April, 2008, the file was re-assigned to KONOYIMA,J. The trial finally commenced before him nearly a year later, on 26 February, 2009 with the Plaintiff giving evidence as PW1.

EVIDENCE OF THE PLAINTIFF AS PW1

10. In his testimony, he said he knew of the transaction between the deceased intestate and the 1st Defendant, and that the deceased intestate died on 1st January, 2001 without liquidating his indebtedness to the 1st Defendant. He spoke of the various attempts he had made to repay the debt, but all such efforts went in vain. He was later informed that the 2nd Defendant had bought the property. He asked the Court to return the property to the deceased intestate's family. He was cross-examined by Defence Counsel, Mr I S Koroma, Solicitor in the firm of M S Turay & Associates, then Solicitors on record for the Defendants. As the cross-examination did not really deal with the subject matter of the Plaintiff's claim, I have not thought it fit to recite its contents. This case is really about whether property situate in the Provinces could be alienated in the manner in which it was done. The propriety of the Plaintiff's capacity to sue only becomes relevant, if this Court holds that he may possibly have a cause of action. The whole of PW1's testimony is at pages 16 - 22 with KONOYIMA, J's numbering. His testimony finally ended on 4 June, 2009. The Plaintiff's case was closed at the end of PW1's testimony. No further proceedings were taken before KONOYIMA, J between that date and 28 October, 2009.

CASE FILE RE-ASSIGNED TO ME

11. The file was re-assigned to me as of 6 November, 2009. There was a further delay in re-starting the case because of the passing away of Mustapha Turay, the head of Defendants' firm of Solicitors. Solicitors and Counsel on both sides gave their consent for the trial to continue before me.

DISMISSAL OF DEFENDANTS' APPLICATION UNDER ORDER 17 HIGH COURT RULES, 2007

12. Earlier in this Judgment, I had referred to an application filed by the Defendants asking this Court to dismiss the Plaintiff's action on the ground that it related to title to land in the Provinces. I heard Counsel in argument in support of, and against, the application. On 25 November, 2009, I expressed the view that the Plaintiff's action did not relate to title to land in the provinces. But as Mr Koroma informed the Court he wished to file an additional affidavit, I held back from giving a definitive ruling. However, on 3 December, 2009, I dismissed the Defendants' Application for the reasons stated on page 4 of my minutes. Defendants' Solicitors had exhibited the deed of conveyance dated 31 December, 2001. There is the death certificate in respect of the deceased intestate's death, and it shows he died on 1st January, 2001. That being the case, he could not have executed a deed of conveyance on 31st December, 2001. There was no evidence before me at that date, that the deceased intestate was alive and well at least 10 days, or, 60 days, as the case may be before the date on the conveyance. That application was dismissed with Costs.

1ST DEFENDANT DIES

13. The file was taken back to the Registry for a while, and was only returned to me on 12 April, 2010. The Court was presented with a death certificate signed by Dr Willoughby stating that the 1st Defendant passed away on 9 April, 2010. Mr Jenkins-Johnston undertook to discontinue the case against the deceased defendant.

SHEARS-MOSES & CO TAKE OVER DEFENCE - 2ND DEFENDANT TESTIFIES

14. When proceedings resumed on 4 May, 2010, Mr Shears-Moses had taken over as Counsel for the 2nd Defendant. On 3 June, 2010, the 2nd Defendant gave evidence in his defence. His evidence is recorded at pages 6 - 9 of my minutes. In sum, his evidence was that he bought the property in Kamakwie from the deceased intestate for the sum of Le8. He tendered a receipt as evidence of the payment. A deed of conveyance was executed in his favour by the deceased intestate. But, he was not

aware of the *'pledge'* transaction between the deceased intestate and his father, the deceased 1st Defendant.

15. After DW1's evidence had been taken, hearing had to be adjourned for the necessary steps to be taken by Counsel for the 2nd Defendant to add to the Court Bundle, an additional list of witnesses, together with their respective witness statements.

DEFENCE WITNESSES

DW2 - PARAMOUNT CHIEF KANDEH SAIO III

16. DW2 was PC Kandeh Luseni III. He adopted his witness statement as part of his evidence in chief. He said he was a witness to the transaction between the deceased intestate and the deceased 1st Defendant. He also witnessed the transaction between the deceased intestate and the 2nd Defendant. Under cross-examination, DW2 said that he fully understood the import of exhibit A, that, it is the pledge or mortgage entered into by the deceased intestate and the deceased 1st Defendant. His signature appears on it. It is dated 10 September, 1997. He agreed that the loan referred to in the agreement was for an indefinite period of time. His attention was drawn to several other documentary exhibits, and he was asked to comment on them. In particular, exhibit D1 is a letter from DW2 to the Senior District Officer, Makeni, notifying the SDO, that PW1 had been appointed Administrator of the estate of the deceased intestate, and that PW1 was thereby empowered to administer the estate of the deceased intestate. This letter was accompanied by another, exhibit D2, dated 8 November, 2005 written by the Chairman, Court No 2, Kamakwie, a subordinate of DW2. This was an innominate piece of correspondence. It was a declaration to all the world that the Plaintiff had been duly appointed to administer the estate of the deceased intestate. The SDO's innominate piece of correspondence, exhibit E, was also shown to the witness. Its contents are based on exhibits D1&2. But as the appointment of an administrator requires a particular process, and this process was probably incomplete at that stage, requiring something more to be done, and which, were in the course of time, was done, I shall return to this issue later in this judgment. DW2's response when shown exhibit E, a letter dated 27 December, 2005 addressed to him by the Plaintiff, was that he had not seen it before. In that letter, the Plaintiff recapitulates the events surrounding the preparation of the pledge/mortgage, and

insists that he will pay off the Le1m debt incurred by the deceased intestate, thus ensuring that the property remains in the estate of the deceased intestate. DW2 was also shown exhibit G, a letter dated 20 March, 2006 addressed to the deceased 1st Defendant by Plaintiff's Solicitors. It reiterates the points raised in the Plaintiff's letter aforementioned, and asserts the authority of the Plaintiff to handle the affairs of the deceased intestate, he having been granted Letters of Administration by the High Court on 19 January, 2004. DW2 said he had not seen the letter before. He ended his testimony on the note that he was living at the residence of the 2nd Defendant during the period he was displaced from his Chiefdom.

DW3 – PA LAHAI TURAY

17. DW3 was Pa Lahai Turay, Chiefdom Speaker, Sella Chiefdom within which Kamakwie is located. He witnessed the pledge/mortgage transaction, and also the sale transaction between the deceased intestate and the deceased 1st Defendant. He was not cross-examined by Plaintiff's Counsel.

DW4 – PA SORIE DUWAHU TURAY

18. DW4 was Pa Sorie Duwahu Turay, the Imam of Kamakwie Central 1 Mosque. His evidence was to the effect that the deceased intestate was a Muslim.

DW5 – A I SESAY ESQ

19. DW5 was Mr Ansumana Ivan Sesay, now The Hon Mr Justice A I Sesay, JA. He adopted his witness statement made on 6 July, 2010 as part of his evidence in chief. His evidence was brief and to the point. Both the deceased intestate and the 2nd Defendant went to him in his chambers. The deceased intestate said he wished to sell his property at Kamakwie to the 2nd Defendant. The 2nd Defendant paid the deceased intestate the sum of Le8m in DW5's presence. DW5 prepared a receipt evidencing the transaction. He explained to both parties the requirements of a provincial transfer of real property. The receipt, exhibit O, is dated 29 September, 2000. It witnesses that the deceased intestate received from the 2nd Defendant the sum of Le8m as payment for the deceased intestate's property at Kamakwie. The receipt is stamped and was witnessed by DW5 and by DW2. DW5 Also identified exhibit K, the deed of conveyance he had prepared transferring ownership of the property at Kamakwie to the

2nd Defendant. It is important to note the lapse of time between the signing of the receipt, 29 September, 2000, and the supposed signing of the deed of conveyance on 31 December, 2001.

CONVEYANCE DATED 31 DECEMBER, 2001

20. The deed needs to be examined further. An interlineation appears on the front page: "*one*" after "*Thousand*". Only the deceased intestate is mentioned as the Vendor. There is no reference in the preamble to the Tribal Authority as required by the Provinces Land Act, Chapter 122 of the Laws of Sierra Leone, 1960 as amended; but there is in the testimonium clause. It purports to have been executed before the Senior District Officer, but not before the resident Magistrate, as required by the said Act. The signatures of DW2, 3 & 6 appear in the testimonium clause. The survey plan enclosed in the deed is MLS 4/2001 and is dated 20 December, 2001. The registration details written on the back page as required by The General Registration Act, Chapter 255 of the Laws of Sierra Leone, 1960 indicate without a doubt that the document was registered on 2 January, 2002. No Court Order is attached to the deed.

DW6 - YARIBO BANGURA

21. DW6 was Yaribo Bangura, a building contractor of 63 Dundas Street, Freetown. He was a witness to the pledge/mortgage transaction, and to the purported sale transaction between 2nd defendant and the deceased intestate. He signed the deed of conveyance. He also adopted his witness statement as part of his evidence in chief.

DEFENCE CLOSES

22. Thereafter, the defence closed. Counsel on both sides submitted written closing addresses.

ASSESSMENT OF EVIDENCE AND POINTS OF LAW INVOLVED

THE LETTERS OF ADMNISTRATION

23. The Plaintiff claims to be the Administrator of the estate of the deceased intestate. He bases this claim on the Grant made to him by this Court on 19 January, 2004. The Grant was later re-sworn on 6 April, 2009 to include the property at Kamakwie as part of the estate. The evidence led at the trial, and which remained uncontroverted till the end, was that

with the place of execution of the deed, not the location of the land in question.

32. Further, the receipt issued by the deceased intestate and the deed of conveyance said to have been executed by him, were not registered within a ten day period after execution as required by the proviso to section 4 of Cap 256 as amended. The deed of conveyance was therefore ineffective to transfer the legal or equitable estate or interest from the deceased intestate to the 2nd Defendant. At the date of death of the deceased intestate, the said property remained part of his estate. What existed was a debt due from his estate to the deceased 1st Defendant. That debt was paid into Court by Plaintiff's Solicitors on 3 March, 2009. It remains to be collected by the personal representative of the estate of the deceased 1st Defendant.

THE PAYMENT OF LE8M

33. As to the payment of Le8m to the deceased intestate, I have no doubt such a payment was made in the presence of DW5. But I have grave doubts about the bona fides of the 2nd Defendant. He denied in evidence that he knew anything about the transaction between his deceased father and the deceased intestate. That seems most unlikely, and unbelievable. He testified that he even gave the deceased intestate an additional loan of Le500,000 after the demise of the deceased 1st Defendant. It seems uncanny and an unlikely coincidence that he should choose to buy property from someone who was already indebted to his deceased father, and whose indebtedness, he had himself increased. I do not believe that he was unaware of this transaction. It seems to me that he had designs on the property, and he offered the deceased intestate a deal he could not refuse. The civil war had ended on the battlefields, but no final peace had been achieved in September,2000 when the deceased intestate received the money. The civil war was only finally declared over in January, 2002. The area in question, Kamakwie, had been adversely affected by the civil war, so much so that DW2, the Paramount Chief had to seek sanctuary in the residence of the 2nd Defendant in Freetown. In any event, Le8m was not in 2000 a princely sum for the sale of any house and land in Sierra Leone. Admittedly, there was, apparently, consideration for the purported sale, and it is said, the law is not concerned about the adequacy of the consideration paid. But where a litigant seeks to enforce the terms of an agreement, and there are legal impediments to achieving his goal, in

the deceased intestate may have died as a practising Muslim. This conclusion is based on the evidence of DW4, and it was not challenged in cross-examination. The Grant was made to the Plaintiff as next of kin appointed by the family according to law of the said deceased. The Grant was taken out by Mr Brewah, and not by Plaintiff's Solicitors. If the deceased intestate died a Muslim, then, ordinarily, the Grant should have been taken out in accordance with the provisions of section 9 of the Muslim Marriage Act, Chapter 96 of the Laws of Sierra Leone, 1960 as amended. PW1 has candidly admitted impliedly that he is neither the son, nor the eldest brother of the deceased intestate. He bases his claim on the appointment made by the deceased intestate's family. However, the attitude of the Courts has been down the ages to uphold bona fide family arrangements notwithstanding that they do not conform to Muslim Law. See: IN RE BANUFEH (DECEASED) [1968 -69] ALR SL 268, HC; IN RE SOLUKU (DECEASED) [1950 -56] ALR SL 8, HC; RE DURING (DECEASED), DURING v ADMINISTRATOR & REGISTRAR-GENERAL [1974-82] SLBALR 324, CA.

SECTION 43 ADMINISTRATION OF ESTATES ACT, CAP 45

24. On the other hand, section 43 of the Administration of Estates Act, Chapter 45 of the Laws of Sierra Leone, 1960 makes provision for the distribution of the estate of anyone described as a '*native*'. Section 43 of Cap 45 is the same as section 43 of the Administration of estates Act, Chapter 2 of the Laws of Sierra Leone, 1946. This latter statutory provision was considered by BEOKU-BETTS, J in the In Re Soloku case cited in paragraph supra. First, section 1 of Cap 45 as amended by the Laws (Adaptation) Act, 1972 – Act No 29 of 1972 states that the Act, i.e. Cap 45, shall apply throughout Sierra Leone except in respect of the estate or part of the estate of a deceased native which is within the jurisdiction of a local court. Section 1 of Cap 45 as amended is in nearly the same terms as Section 1 of Cap 2 of the 1946 Laws, taking into consideration the Constitutional situation of Sierra Leone pre-independence when Sierra Leone was divided into colony and protectorate. In Re Soloku, BEOKU-BETTS, J said at page 10, LL30 et seq: "*By the joint effect of s.1(b) and s.43 of the Ordinance, native law and custom is recognised and must be applied. In my opinion the persons who would be entitled to distribution according to native law and custom would also be the persons entitled in order of priority to the grant of*

letters of administration. The principle on which this court acts is that the grant of administration follows the interest..... The law is admirably stated in 14 Halsbury's Laws of England, 1st Ed, at 182 as follows: "The foundation of the jurisprudence of the court to make a grant is that there is property belonging to the intestate within its jurisdiction to be distributed.... " There is nothing in the Ordinance which precludes a native of the Protectorate from being granted letters of administration to the estate of another if the property is within the jurisdiction of this court and not within the jurisdiction of any native court. In my opinion the law places the estates of deceased persons who leave property in Freetown in the same position whether they are natives of the Colony or the Protectorate. The only difference is as to the method of distribution....."
BEOKU-BETTS, J went on to consider whether the mother of the deceased intestate in that case was entitled to a grant. He came to the conclusion that he could not do so without further evidence that there were no living children, brothers or sisters of the deceased who would have a prior claim to the deceased intestate's estate. But in principle, he concluded by deciding in principle in favour of the applicant, the mother of the deceased intestate. He granted liberty to apply.

25. In Re BANUFEH cited above, OKORO COLE, Ag CJ had this to say at pages 272 - 273: "*.....My appreciation of the position is that in normal circumstances the distribution of the said premises according to Mohammedan law would apply. I find nothing however, in the evidence which states that the provisions laid down in the Koran or in Mohammedan law must necessarily apply. Family arrangements are not unknown to Mohammedan law. It must be remembered in this connection that family arrangements are specially favoured in courts of equity, of which this court is one.....Where, as I have already found, there is clear evidence of a bona fide family arrangement regarding the disposal of Muctarr's property in the said premises after his death and the arrangement was acted upon voluntarily, I do not think it would be proper for this court to upset such an arrangement, except in extreme cases. This is not such a case. The plaintiffs in their statement of claim rely on this family arrangement. This they are entitled to do. They have led evidence which satisfies me of the existence and validity of such an arrangement. No good grounds have been alleged in the defence filed by the defendants or established by the evidence which would justify me to disturb the*

arrangement. The provisions of the arrangement are not, in my view, unreasonable……."

26. Following the trend set by both BEOKU-BETTS, J, and OKORO COLE, Ag CJ, I too would say this is a Court of equity, and that family arrangements ought to be recognised and enforced by the Courts. I hold therefore, that it was competent in the Plaintiff to apply for, and to obtain a Grant to administer the estate of the deceased intestate.

SECTION 4 INTERPRETATION ACT, 1971 AS IT AFFECTS GRANT MADE TO PLAINTIFF

27. Further, the term native is defined in section 4 of the Interpretation Act, 1971. It means any person who is a member of a race, tribe or community settled in Sierra Leone (or the territories adjacent thereto), other than a race, tribe or community – (a) which is of European or Asiatic or American origin; (b) whose principal place of settlement is in the Western Area. The deceased intestate clearly falls within this definition of a Native. And if he does, sections 43(2), (3) & (4) of Cap 45 as amended by the Administration of Estates (Amendment) Act, 1975, stipulates how his estate may be divided. However, none of these provisions stipulate the type or kind of person entitled to the Grant, other than the Administrator and Registrar-General. But they do not exclude a person such as the Plaintiff who has been appointed by the family and who is recognised by the Paramount Chief, the Senior District Officer of Bombali District within which Kamakwie then fell, and the Chiefdom Council of the Sella Limba Chiefdom as such. Exhibit D1 dated 8 December, 2005 is evidence of DW2's acknowledgement of the Plaintiff's appointment. Exhibit D2 dated 8 November, 2005 is evidence that the Court Chairman, Court No. 2, Sella Limba Chiefdom also acknowledged the Plaintiff as such. And exhibit E dated 23 December, 2005 is also evidence that the Senior District Officer of Bombali District acknowledged him as such. On a close reading of Section 43 of Cap 45 as amended by Act No 16 of 1975, it may seem that other than a person appointed in the manner in which the Plaintiff was appointed, the only other person or authority who may be able to obtain a grant would be the Administrator and Registrar-General.

ACTION FOR REVOCATION OF GRANT - REQUIREMENTS

28. In an action for revocation of a grant, the person who seeks it must be in a position to obtain it. The 2nd Defendant is in the position of a creditor to the estate of the deceased intestate. The proviso to section 9 of Cap 45 enables a creditor to a Muslim deceased intestate's estate to apply, for and to obtain a Grant. But that person should not be a Muslim. 2nd Defendant was sworn on the Bible before he testified which makes him, prima facie, a Christian. This qualifies him to apply for a Grant to be made to him. But for him to be able to do so, he would first have to institute an action for the revocation of the grant made to the Plaintiff in accordance with the procedure laid out in Order 55 of the High Court Rules, 2007. He cannot obtain the revocation of a grant by way of a counterclaim. If that where the case, it would render nugatory the express terms of the Rules of Court. See RE DURING (deceased) cited above. There, at page 326, BECCLES-DAVIES, JA stated: "*.....The proper mode of commencing such proceedings is by citation not by Judge's summons....*" That was the procedure then. The present procedure is what is contained in Order 55. For this reason, the appellant's appeal in that case, was dismissed and the order for rectification of the grant made was set aside because the correct procedure had not been followed. For all the reasons set out above, the 2nd Defendant's prayer that the Grant made to the Plaintiff be revoked, is cannot be granted.

THE PURPORTED PLEDGE/ MORTGAGE

29. I shall now move on to the transaction between the deceased intestate and the deceased 1st Defendant. The transaction involved the loan of the sum of Le1m to the deceased intestate. No repayment date was stated. It was therefore a debt due from the deceased intestate to the deceased 1st Defendant, and no more. The receipt stated that security for the loan was provided by the deceased intestate by way of a pledge or mortgage of his house at Kamakwie. With the greatest respect to Solicitors and Counsel for the Defendants, that document did not constitute an enforceable mortgage in law, be it a legal or equitable mortgage. The mortgage was not created by deed, though it purportedly involved the disposition of an interest in land. It therefore failed to meet the requirements relating to legal charges, mortgages and the like. Mortgage is an inclusionary term. It is defined in section 2 of the Conveyancing and Law of Property Act, 1881 which is part of our laws by virtue of the schedule to the Imperial Statutes (Law of property) Adoption Act,

Chapter 18 of the Laws of Sierra Leone, 1960. "*Mortgage includes any charge on any property for securing money or money's worth.....*" ELPHINSTONE & MAW THE MODERN LAW OF PROPERTY 5TH Edition, 1906 at page 382 defines a mortgage as: "*A mortgage of land is a conveyance of the land by a borrower (the mortgagor) to a lender (the mortgagee) by way of security for a loan*". The Learned Editors state at page 412: "*Notwithstanding the Statute of Frauds, which requires an agreement relating to lands to be in writing, a mere deposit of deeds without any writing, as security for a loan, may operate as an equitable mortgage in respect of the lands comprised in the deeds; on the principle that such deposit is evidence of an agreement to make a mortgage; but it is in all cases a question of the intention of the parties.....*" Of course, in this case, there is no evidence of the existence or the depositing of any title deed in respect of the property at Kamakwie Road.

STATUTE OF FRAUDS, S 3 REAL PROPERTY ACT, 1845, REGISTRATION OF INSTRUMETS ACT, CAP 256

30. The receipt did not meet with the requirements of section 1 of the Statute of Frauds, 1677. There was writing in the form of a piece of paper, exhibit B. But that piece of paper did not also meet with the requirements of section 3 of the Real Property Act, 1845 which states: "*A feoffment, made after the said first day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by deed.....*".
31. Section 4(1) of the Registration of Instruments Act, Chapter 256 of the Laws of Sierra Leone, 1960 as amended by Act No. 6 of 1964 provides that deeds may take effect from their date of execution if, executed in the Western Area, within a ten day period; and if executed in the Provinces, if registered at the Registrar-General's office within a 60 day period. In 1964, section of Cap 256 was amended by the inclusion of a new subsection 4(2), This stated: "*(2)(a) Every deed, contract or conveyance executed after the 1st day of June, 1964, shall be void, so far as regards any land to be thereby affected, unless it is registered within the appropriate period limited for such registration under the proviso to subsection (1).*" The time stated for registration of a deed executed in the Western Area, is ten days, not sixty days. The deed in this case was executed at the chambers of DW5, not in the Provinces. The time limit for registration stipulated in the proviso to section 4 of Cap 256 deals

this case, failure to comply with the requirements of Cap 256, and with the provisions of other statutes, it is permissible for the Court to look at the relative equities. I have come to the conclusion that the Law of Equity cannot help the 2nd Defendant in all the circumstances of the case. He has not come to this Court asking for specific performance of the contract for a possible sale which is all the receipt issued by the deceased intestate could possibly amount to. He has come claiming a legal right to the property in respect of which he paid this amount of money. This Court cannot grant him a remedy which he has not sought. His Counterclaim therefore ought to fail, and it fails accordingly.

PLACE OF CUSTOMARY LAW IN OUR JURISPRUDENCE

34. Lastly, I shall refer to the case of KARGBO v KANU [1970 71] ALR SL, 378, HC, Judgment of LAWRENCE HUME, J. Headnote 2 of that Report, reads as follows: "*Temne land in the Koya Chiefdom can be loaned to a stranger but he can never acquire absolute ownership of it; the original donor and his family always retain the title, which in the event of the old age and infirmity of the donor can be defended by his son on his behalf. On the death of the done his heir must obtain renewed permission from the donor's family if he wishes to remain in the property.*" In that case, the donor was of the Temne tribe, and the donee was of the Loko tribe. The donee claimed in the local court that the land in dispute had been given to his late father. The local court dismissed his claim on the ground that being a Loko man, he was a stranger in the Koya Chiefdom and by Temne Custom, he could not own land there. The use to which the donee's father had put the land, was considered as a loan, not as an out and out gift. The heir of the done would have to re-apply to the Chief in order to continue to make use of the land. I have cited this case for no less a reason than to illustrate how much local customs and traditions are respected by, and recognised in our Superior Courts of Judicature. I would not wish to depart from that practice. The justice of this case demands that the Plaintiff should succeed on his claim and that the Defendant's counterclaim should be dismissed with Costs. It follows also, that the deed dated purportedly, 31st December, 2001 is unsupportable in law, and ought to be struck down.

35. There shall be judgment for the Plaintiff in the following terms:

1. This Honourable Court Adjudges Orders and Declares that the Plaintiff is the duly appointed and authorised personal representative

of the deceased Pa Momodu Mansaray's estate, and was entitled to the Grant which he obtained on 19 January, 2004 and resealed on 6th April, 2009. The legal estate in the estate of the said deceased intestate, including the house and land at 8 Kambia Road, Kamakwie, vests in the Plaintiff. As such, he is entitled to represent the interest of all beneficiaries of, and in, the estate of the said Pa Momodu Mansaray.

2. This Honourable Court Adjudges, Orders, and Declares that the Plaintiff is entitled to the immediate recovery of possession of the property at 8 Kambia Road, Kamakwie, Sella Limba Chiefdom, Bombali District in the Northern Province of Sierra Leone. All persons occupying the said property shall vacate the property as of the date of this Judgment.
3. In view of the Orders made above, the sum of Le1m paid into Court by Plaintiff's Solicitors, shall be paid out immediately to the 2nd Defendant, as personal representative of the estate of his late father, the deceased 1st Defendant. The estate of the deceased intestate shall pay to the personal representative of the estate of the deceased 1st Defendant, interest thereon at the rate of 28% per annum from 10 September, 1997 to 3rd March, 2009 the date payment into Court was made. Receipt No. AG 25835 dated 3 March, 2009 is evidence of such payment.
4. The 2nd Defendant's Counterclaim is dismissed with Costs.
5. In consequence of Order 4, supra, deed of conveyance dated purportedly, 31st December, 2001 and duly registered as No 9/2002 at page 86 in volume 549 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown is hereby declared null and void. The said deed shall be expunged from the said Record Books of Conveyances.
6. The Plaintiff shall have the Costs of the action, such Costs to be taxed, if not agreed.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JSC