C.C. 12/20 2020 D. N0.2

In the High Court of Sierra Leone

(Land, Property and Environmental Division)

Between:-

Haja Fanta Daramy

Suing by Her Attorney Mariama Kondeh) - Plaintiff

And

Emmanuel Sanko Sawyer and Others - Defendants

Counsels:

Abubakarr Dexter Bangura Esq. and C. Campbell Esq. for the Plaintiff/Applicant.

Emmanuel Teddy Koroma for the 1st and 2nd Defendants/Respondents.

E.F Beoku-Betts Esq. for the 3rd Defendant/Respondent.

P. Fofanah for the 4th and 5th Defendants/Respondents.

G. Conteh for the 7th Defendant/Respondent.

**Ruling on an Objection to Cross Examine Deponents on the Authenticity of the Contents of their Affidavits in Opposition, Delivered by The Hon. Dr. Justice A. Binneh-Kamara, on Monday, 7th December, 2020.**

## 1.0 Introduction.

This ruling is consequent on a number of relevant facts and facts in issue that should be first put into context to set the records straight; and to further articulate the circumstances that culminated in the filing of the notice of intention, by Counsel for the Plaintiff/Applicant, Abubakarr Dexter Bangura Esq.(hereinafter referred to as Counsel for The Applicant), to cross-examine Counsel for the 1st and 2nd Defendants/Respondents, Emmanuel Teddy Koroma Esq.(hereinafter referred to as Counsel for The 1st and 2nd Respondents), Patrick Fofanah and Kabbineh Ibrahim Kamara, on the authenticity of the contents of their affidavits in opposition, dated 31st March, 2020, 25th March, 2020, and 28th March, 2020.

Further, Counsel for The Applicant, had filed an ex parte notice of motion, dated 23rd February, 2020, for three specific orders: interim injunction, interlocutory injunction and cost. That application was bolstered by the affidavit of The Applicant's Attorney (Mariama Kondeh) of N0.12 Lumley Road, Spur Road, Freetown. Meanwhile, on 3rd March, 2020, this Honourable Court in its wisdom, granted one of the reliefs (the interim injunction) prayed for in that ex-parte application of 23rd February, 2020; and ordered that Counsel for The Applicant, should serve the requisite processes on the other counsels, representing The Respondents, for whom appearances had been entered, but neither the interlocutory injunction, nor the cost was granted.

The decision (at that stage) was precipitated by the fact that granting an interlocutory injunction, without giving an opportunity to the other side to be heard, would have amounted to a clear manifestation of injustice; and a contravention of the constitutional principle of of 'audi alteram partem' {see Subsections 1 and 2 of Section 23 of The Constitution of Sierra Leone, Act N0.6 of 1991). Again, the cost as requested was not granted, because the application's merit had not been determined at that stage of the proceedings.

**1.1 <u>The Notice of Intention to Cross-Examine.</u>**

As directed, Counsel for The Applicant, did serve the requisite processes on the other solicitors; and they subsequently filed their affidavits in opposition for the interlocutory injunction to be argued and determined by This Honourable Court. It is against this backdrop that, Counsel for The Applicant, became disenchanted with some of the facts deposed to in particularly the aforementioned affidavits of the said persons. He therefore filed in three (3) notices of intention to cross-examine The Counsel for the 1st and 2nd Respondents (Emmanuel Teddy Koroma), Patrick Fofanah and Kabbineh Ibrahim Kamara, on the authenticity of the contents of their affidavits in opposition, dated 31st March, 2020, 25th March, 2020 and 28th March, 2020, respectively.

**1.2 <u>The Objection.</u>**

When this matter came up for hearing on the 17th November, 2020, Counsel for the 1st and 2nd Respondent, who is one of the affiants, to be cross-examined, raised the following arguments in justification of why he thinks this Honourable Court should not grant the application:

1. **The notices to cross-examine lack legal basis; as there is no law, giving Counsel for The Applicant the privilege to cross-examine** deponents on the contents of their affidavits. He requests the

Bench to peruse the provisions of Constitutional Instrument N0. 25 of 2007, The High Court Rules, 2007 (hereinafter referred to as The HCR, 2007) to authenticate his submission.

2. That Sub rule (3) of Rule 3 of Order 32 of The HCR, 2007, does not have anything to do with notices of intention to cross examine; thus, the provision is inapplicable to the issue, which this Honourable Court must determine.
3. Every affidavit must contain facts that the deponent can prove. Should the other side be dissatisfied with the facts that are deposed to in an affidavit, it is for him to file in an affidavit in reply, debunking such facts.
4. That in accordance with the repealed High Court Rules of 1960, an affidavit in reply, must have been filed, responding to the specific facts in an affidavit, prior to the filing of any notice of intention to cross-examine, any affiant on any fact deponed to in an affidavit.
5. Counsel concluded that the notices of intention to cross-examine, are nothing but a ploy to delay the proceedings.

**1.3 <u>Adopting the Objection.</u>**

Meanwhile, save for E. F. Beoku-Betts Esq.(Counsel for The 3rd Respondent), whose client's affidavit in opposition, does not appear to have contained any facts or facts in issue, that should necessitate a cross-examination, G. Conteh Esq., and P. Fofanah Esq., whose client's affidavits in opposition, contained facts and facts in issues that, according to Counsel for The Applicant, have necessitated rigorous cross examinations, chose to adopt the objection of Counsel for the 1st and 2nd Respondent (as canvassed above), but made the following addenda:

1. The issues raised and facts deposed to can be decisively addressed should counsel for The Applicant, file in an affidavit in reply to the affidavit in opposition.
2. The trite law on the issue to be determined is followed by a procedure similar to the rule of pleadings. The affidavit in support of the application of 23rd February, 2020, is technically their statement of claim; and the affidavits in opposition are the defenses to the statement of claim, which is their affidavit in support. What should follow is a reply to the affidavits in opposition, which is yet to be filed; hence the application, should be discountenanced.

**1.4 <u>The Oppositions to the Objection.</u>**

Nonetheless, Counsel for the Applicant, contends that the grounds on which the objection is predicated are baseless; and the objection should be rejected in its entirety, because of the following reasons:

1. It is trite law that a deponent making a spurious allegation against an affidavit of another deponent ought to be cross-examined at the behest of The Applicant's solicitor, should the need arise.
2. The affidavit in opposition, deponed to by Counsel for the 1st and 2nd Respondents, contains a host of unsubstantiated allegations against The Plaintiff, to which appallingly, however, no evidence was adduced. Thus, to be able to verify the authenticity of contested facts, deposed to in an affidavit, the other side in the interest of justice, should be given the opportunity, to cross-examine the deponent.
3. It is interesting to note that Counsel for the 1st and 2nd Respondents, has also filed in a notice of intention to cross-examine the deponent of the affidavit in support of the application of 23rd February, 2020.

4. The principle of 'audi alteram partem', compels the court to hold the scales balanced in circumstances, wherein a litigant deems it necessary, for the court to be able to analyse the facts, deposed to herein. Counsel relies on Sub rule (3) of Rule 3 of Order 32 of The HCR, 2007.

## 1.5 The Objection in the Context of Sierra Leone's Adjectival Law.

This Honourable Court is quite clear about the fact that the contention that it must resolve is firmly rooted in the province of Sierra Leone's adjectival law. Adjectival law, which does not create rights and obligations, constitutes what are generally known as rules of evidence and procedure; which are the principal mechanisms, pursuant to which rights and obligations are enforced. Emphatically, it is the substantive law that establishes the rights and obligations that are enforced, pursuant to adjectival law. However, the fact in issue that is to be resolved is both evidential and procedural. Thus, it is evidential because it generically relates to affidavits. And issues of evidential value and the relevance of affidavits (in support, in opposition, in reply etc.) in particularly civil litigation, cannot be overemphasised.

Again, the issue is procedural, because there is a contention about the procedural legality or relevance, to allow deponents, who have factually deposed to certain affidavits in opposition, to be cross-examined on the authenticity of the very contents, deponed to in their respective affidavits. Thus, I am obliged to determine both the evidential and procedural legality and relevance of the facts in issue, underpinning the objection. I will start with the objection's evidential significance. Essentially, the complexities of issues relating to relevance, admissibility and weight in the law of evidence, have been demystified and laid bare by even legal academics in the commonwealth jurisdiction. Thus, every

fact which is relevant to any other fact in issue is relevant and therefore admissible.

However, notwithstanding its admissibility, the weight which a reasonable and a credible tribunal of facts attaches to it, is what is much more important. Meanwhile, the nature of civil litigations, requires much evidence to be adduced via affidavits. The complexities of civil litigations, inter alia demand the filing of a plethora of pre-trial motions by both sides of the litigations; supported by the requisite affidavits. And the courts will never be able to judiciously and expeditiously determine such pre-trial motions, if they are not equipped with the apposite pieces of evidence; deponed to in such affidavits. Thus, because such applications are made before the commencement of the trials, it would be legally and even rationally inexpedient to call witnesses to come testify on oaths. So, the facts that they deposed to in their requisite affidavits are of very serious evidential value.

In tandem with the constitutional principle of 'audi alteram partem' (hear the other side), the courts will never grant the reliefs prayed for without allowing the other side to present their case. This is the essence of the filing of affidavits in oppositions; in circumstances, wherein the applications are made inter parte. However, this is not the case in circumstances, wherein the courts are to deal with ex parte applications. Alas! Even when it comes to ex parte applications, the applicants are obliged to make full and frank disclosures of the undiluted facts that inevitably necessitate the applications to the courts, in order for them to be able to make fair, just and reasonable judgments on such applications; and the applications' urgency, must not under any circumstances, be self-induced. This is how the courts, as arbiters of justice, have been able to hold the scales balanced; and maintain their neutrality, integrity, credibility and independence, in the determination of particularly the plethora of pre-trial motions that they must rule on on a plethora of

complex civil litigations that usually come before them for hearing and determination on a daily basis.

Significantly, on the evidential significance to cross-examine deponents of affidavits, The Court of Appeal of British Columbia held in **Brown v Garrison** (1969) 63 W.W.R. 248 at 205, ... 'that the discretion of this court in allowing cross-examination on affidavits must be exercised on proper principles and in the normal course will be ordered where the affidavit contains fact that are in issue'. Thus, the affidavits of 25th, 28th and 31st March, 2020, which are the subject of the objection, undoubtedly contain a plethora of facts that are relevant to the facts in issue of this matter. Therefore, on the basis of this criterion alone, This Honourable Court will be tempted to dismiss the objection and order that the deponents in the affidavits of the aforementioned dates, be accordingly cross-examined.

Meanwhile, this issue is clearly articulated in the first two points, raised by Counsel for The Applicant, in justification of his submission that the objection must not be sustained. But any attempt to determine the objection from the standpoint of its evidential significance alone, will be guilty of a naïve legal miscalculation. Procedurally, some of the issues explicated in the foregoing analysis, are accordingly articulated in Order 31 of The HCR, 2007, which exclusively deals with affidavits. Nevertheless, my reading of Order 31, depicts that there is nothing in its purports and contents that can be of help in resolving the issue in which the objection is clothed. Furthermore, the reference by Counsel for The Applicant to Sub rule (3) of Rule 3 of Order 32 of The HCR, 2007, does not bolster his justification of why he thinks the application, should not be countenanced.

Moreover, Order 32 concerns evidence by deposition, including the power to order depositions to be taken; the circumstances where the

persons that are to be examined are out of the jurisdiction; the order for issue of letter of request; enforcing attendance of witnesses at examination; refusal of witnesses to attend etc. Significantly, since Order 32 does not have anything to do with notices of intention to cross examine; I will thus conclude on this point that the provision, which Counsel for The Applicant, thus alluded to in Order 32 is inapplicable to the issue, which This Honourable Court must determine. Essentially, the decided case, referenced above {**Brown v Garrison (1969)** 63 W.W.R. 248 at 205}, further alludes to another vital procedural issue that is crucial in the determination of whether a court of competent jurisdiction will grant or refuse to grant an application that calls for deponents to be cross-examined, on the contents of their affidavits.

Thus it was also held: '... in keeping with the exercise of discretion, that there is also the general rule that a party must file its affidavit, before he or she can cross-examine a deponent on the opposing side'. This principle was also accordingly enunciated in **Paterson v Hodges (1914)**, 20 B.C.R 598 at 602, 601 (B.CC.A). Furthermore, the Supreme Court of British Columbia inter alia held in **Royal Bank of Canada v Larry Micheal Jones, 2000** BCSC 520 (CanLII), that 'The Plaintiff (Ms. Buffam) swore to her affidavit in support of the 1995 summary trial application, which was filed and delivered to The Defendant on December 8, 1995. Thus, The Defendant had been in possession of that affidavit for approximately four years; he could have consulted with different law firms that would have advised on whether or not to cross-examine The Plaintiff or another representative, failing her availability'.

In effect, the Supreme Court of British Columbia, upheld the Court of Appeal's decisions in the foregoing cases; and emphasized the significance of the principle that even the application to cross-examine, has to be made within a reasonable period of time, for it to be entertained by a court of competent jurisdiction. The position of British

Columbia on the need to file an affidavit in reply to an affidavit in opposition, before service of the notice of intention to cross-examine is in accordance with the provision of the repealed High Court Rules of 1960, which makes it quite clear that an affidavit in reply, must have been filed, responding to the specific facts in an affidavit in opposition, prior to the filing of any notice of intention to cross-examine, an affiant on facts deponed to in an affidavit.

However, the Rules of Court Committee, advertently or inadvertently, expurgated the foregoing provision, which was neatly embedded in the 1960 rules, in developing and shaping the procedures, culminating in The HCR 2007. Thus, there is now a lacunar in this area of Sierra Leone's adjectival law. Indeed, there is now no provision in The HCR, 2007, regulating the very issue upon which the objection, which is to be determined is predicated. So in the circumstance, it appears, that the issue that is to be determined, is subject to the unfettered discretion of The Bench. But this Bench is minded and inclined, to give credence to the position, articulated in the aforementioned decided cases of the Court of Appeal and Supreme Court of British Columbia; which has become a trite law in our jurisdiction, by virtue of the 1960 rules.

This trite law (according to Counsel for the 4th and 5th Respondents) is akin to a procedure similar to the rule of pleadings. The affidavit in support of the application of 23rd February, 2020, is technically their statement of claim; and the affidavits in opposition are the defenses to their statement of claim (which is their affidavit in support). What should follow is a reply to the affidavits in opposition, which is yet to be filed. I will indorse this analogy, as it clearly dovetails with the position, which This Honourable Court has taken in the determination of this objection. Circumspectly, it cannot be denied that the notice of intention to cross-examine was filed, within a reasonable period of time {see **Royal Bank of Canada v Larry Micheal Jones,** 2000 BCSC 520 (CanLII)}. What is clearly

not complied with, by Counsel for The Applicant, is that he did not file the requisite affidavits in reply to the affidavits in opposition, containing the scurrilous and spurious allegations, which he wants to debunk. Against this backdrop, and on the basis of the aforementioned authorities, it would be procedurally unwise to get Counsel for The Applicant to conduct the three distinctively different cross-examinations at this stage, without filing his affidavits in reply to the affidavits in opposition he is challenging. Therefore, I will order Counsel for The Applicant to go do the needful; as articulated in the foregoing paragraph. And will make no order as to cost. I so order.

7/12/2022

The Hon. Dr. Justice A. Binneh-Kamara, J.

Justice of the Superior Court of Judicature

of Sierra Leone.