C. C 225/19 2019 V. N0. 3

(In the High Court of Sierra Leone)

Between:-

Zainab Vandy - Plaintiff

(Suing by Her Attorney

Modiboh Jebbo)

N0.8 Candi Close

Juba Hill

Freetown

And

Mohamed Bangura - 1st Defendant

Pa Momoh Bangura - 2nd Defendant

Mr. Abu - 3rd Defendant

Miss Fatmata - 4th Defendant

All of Sussex

Freetown

Counsels:

S. A. Bah Esq., for the Plaintiff/Respondent.

G. Conteh Esq., for the 1st Defendant/Applicant.

Ruling on an Application to Strike Out the Writ of Summons, Dated 20th June, 2019 on the Basis of an Irregularity that the Power of Attorney, Pursuant to which the Action is Commenced, though Executed Out of the Jurisdiction, was not Notarized, Delivered on Wednesday, 1st July, 2020, by The Hon. Justice Dr. A. B.M. Binneh-kamara.

1.0 Introduction

This is a ruling, consequent on an application made to this Honourable Court, by notice of motion, dated 30th September, 2019, to inter alia, strike out the writ of summons, dated 20th June, 2019, on the basis of an irregularity that the Power of Attorney, dated 14th May, 2019, pursuant to which this action was commenced, though Executed out of the jurisdiction, was not notarized. The application also requests for cost; and to strike out all subsequent proceedings and orders, given by this Honourable Court, since the commencement of this matter. The application is strengthened by the affidavit of Mohamed Bangura, sworn to and dated the 30th September, 2019; containing three (3) exhibits attached thereto, to wit: a copy of the writ of summons (Exhibit MB1), commencing this action, a notice and a memorandum of appearance (Exhibit MB2), and a copy of the aforementioned Power of Attorney (Exhibit MB3). Meanwhile, on the 15th October, 2020, G. Conteh Esq., moved the foregoing motion; with a very clear focus and élan. Meanwhile, the 1st Defendant on whose behalf the foregoing motion is

filed, is hereinafter referred to as the Applicant and the Plaintiff, on whose behalf the application is responded to, is hereinafter referred to as the Respondent.

1.1 <u>The Submissions of Counsel for the Applicant</u>

The principal arguments, which Counsel for the Applicant, adduced in a bid to convince this Honourable Court to grant the application, are thus presented below:

1. The definition of a Notary Public is crucial to the determination of this application. Counsel submits that a Notary Public is a person authorised to perform certain legal functions, including the certification, of documents to use in other jurisdictions. Counsel further submits that a Power of Attorney, is one such document, which can be used in another jurisdiction; and also refers the Bench to Paragraph (e) of Subsection (1) of Section 17 of the Constitution of Sierra Leone, Act N0.6 of 1991 (hereinafter referred to as Act N0.6 of 1991).
2. The Power of Attorney, pursuant to which this action is instituted, is not notarized. Counsel refers the court to Page 2 of Exhibit MB3, which is the Power of Attorney, registered in accordance with the Registration of Instruments Ordinance, Cap. 256 of the Laws of

Sierra Leone 1960, as Amended by the Registration of Instruments Amendment Act N0.6 of 1964; noting that the said Instrument, does not bear the stamp and signature of a Notary Public. Counsel pontificates that this is a fatal irregularity that should compel the Bench to strike out the foregoing writ of summons, with substantial cost.

3. In tandem with the aforesaid submission, Counsel further argues that the High Court of Justice of the Republic of Sierra Leone, has ruled that a Power of Attorney, executed out of the jurisdiction, must be notarized. Counsel urges the Bench to look at that ruling (which he promised to produce, but could not produce up to the time, when this ruling was written).
4. Finally, the said Power of Attorney (Exhibit MB3), was made in contravention of the provisions of Cap.13 of the Laws of Sierra Leone, 1960, found in Volume 1 of same. This is the basis of Counsel's argumentation, rationalised in the first point mentioned above.

1.2 <u>The Submissions of Counsel for the Respondent</u>

The central arguments, which Counsel for the Respondent, adduced in a bid to convince the Bench to deny the application, are thus stated as follows:

1. The reason why documents are notarized is to prevent fraud and to ensure that the person, who claims to have executed the document is the actual person. In this case, there is no doubt that the person, who executed the Power of Attorney is the Respondent. And there is no doubt about the connection between the Respondent and the Attorney. Counsel also states that the Applicant, is not adversely affected by the form of the Power of Attorney.
2. The Power of Attorney has already been registered with the Office of the Administrator and Registrar General. Thus, Counsel emphatically relies on the presumption of regularity; and refers this Honourable Court to Halsbury's Laws of England, Fourth Edition, Re-issued Vol. 17 (1) at Paragraph 583, under the rubric Legality and Regularity. The presumption of regularity in this case has not been rebutted.
3. Section 14 of Cap. 256 does not cover a Power of Attorney, according to the definition of Instruments in the Act.
4. Finally, Counsel prays of the Bench to let substantive justice prevail over technicality, because there is no iota of doubt as to the relationship, between the Respondent and the Attorney; about whether it was the Respondent that actually executed the Power of Attorney. Hence, the application, should be dismissed with cost.

1.3 The Approach/Method Guiding the Determination of the Application

Circumspectly, to determine the application of 30th September, 2019, I shall review the position of the law, in relation to the foregoing arguments, which both Counsels have sequentially canvassed; and simultaneously determine, whether the application, should or should not be granted. In doing so, I will reduce the central arguments of Counsels into eight (8) thematic questions, which I will sequentially answer, consonant with the apposite judicial and statutory authorities; as they subsist in the existing legal literature. However, for ease of reference, I will answer the first, second and third questions, from the standpoint of a singular analysis, because that analysis touches and concerns, the principal thrust of all three questions. The same approach will be adopted in respect of the fifth and sixth questions, but the responses to the other questions will be articulately informed by their individual analysis.

1.3 Contextualizing the Law against the Backdrop of Counsels' Arguments

This contextualization will essentially be guided by the following central questions, which are discernible, from the argumentations and protestations of both Counsels (as catalogued above):

1. Is a Power of Attorney a Registrable Instrument in Sierra Leone?
2. Does Section 14 of the Registration of Instruments Ordinance, Cap. 256, as Amended by the Registration of Instruments (Amendment) Act N0.6 of 1964, have anything to do with the registration of a Power of Attorney?
3. What is the indubitable position of the appropriate law of Sierra Leone, regarding the legality of the use of a Power of Attorney, executed out of the jurisdiction?
4. Is the Power of Attorney (Exhibit MB3), pursuant to which this action was instituted, accordingly registered, in accordance with the relevant provisions of Cap.256 of the Laws of Sierra Leone, 1960?
5. Does the presumption of legality/regularity, hold good in a circumstance, wherein the compliance with a statutory provision is contended?

6. Is the objection raised in the motion of 30th September, 2019, shrouded in a mere technicality; or does it dovetail with a mandatory statutory provision?
7. Was Exhibit MB3 made in contradistinction to the provisions of Cap.13 of the Laws of Sierra Leone, 1960?
8. Does Section 17 of Act N0.6 of 1991, have anything to do with the need to grant or refuse the application of 30th September, 2019?

1.3.1 Questions One, Two and Three

Constructively, the first three questions can be incisively answered by a thorough exploration of the appropriate statute, dealing with registration of instruments in Sierra Leone. That is, Cap.256 of the Laws of Sierra Leone, 1960, as Amended by Act N0.6 of 1964. Textually and interpretatively, Section 2 of Act N0.6 of 1964, transformed the original Section 4 in Cap. 256, into Section 4 (1). Simpliciter, Section 4 in Cap. 256, which hadn't any subsection, now encompasses two subsections: 1 and 2. Whereas Subsection (1) makes the registration of instruments mandatory; Subsection (2) provides for the registration of instruments out of time.

The essence of this fundamentally crucial amendment was to confer original exclusive jurisdiction on the High Court of Justice, to examine

and determine the peculiarity of justifiable circumstances that might have prevented the registration of instruments, within the period contemplated in Subsection (1) of Section 4. However, though the provisions in the said Section, appear to be elaborate, it is conspicuous from the content of Subsection (1) that a specific reference is made to Powers of Attorney. And the side note of same, is undoubtedly cognate with this.

Further, the subsection, distinguishes two peculiar circumstances: The first, relates to registrable instruments, concerning realty in general; and the second, is cognate with Powers of Attorney, in particular. The first (which is not within the purview of the issues to be determined in this application) concerns the compulsory registration of deeds, contracts or conveyances, executed after the 9th February, 1857; and how such registrable instruments, shall take effect, as against other deeds affecting the same land, from the date of their registration. Nonetheless, this principle was wrongly applied in **D**avies **v. B**ickersteth (1964-1966) A. L. R. (S. L.) 403, but was succinctly overturned by Livesey Luke, C. J. in **D**r. **S**eymour **W**ilson **v. M**usa **A**bess Civ. App. 5/79.

The second that touches and concerns Powers of Attorney, also contemplates two factual circumstances: <u>those relating to the institution and defence of judicial proceedings and those that do not.</u> For those in

the former category, according to The Hon. Justice N. C. Browne-Marke (JSC), whilst giving credence to the Judgement of The Hon. Justice V. M. Solomon (JSC) in **S**antigie **K**amara **v. M**ilicent **M**ansaray (**N**ee **K**amara-**T**aylor, **L**yndon **K**amara-**T**aylor and **R**aymond **K**amara-**T**aylor (Civ. Appeal 48/2010) (Judgment Delivered on 12th February, 2019) '... there is no real legal requirement for Powers of Attorney to be registered if they concern court proceedings' (see page 4).

For Powers of Attorney unrelated to defence and judicial proceedings, they do really take effect immediately they are registered in the appropriate books of Powers of Attorney, kept in the Office of the Administrator and Registrar General at Walpole Street, Freetown, in the Western Area of the Republic of Sierra Leone {see Sections 4 and 5 of the General Registration Ordinance, Cap.255 of the Laws of Sierra Leone, 1960). Pursuant to the aforementioned analysis, it cannot be legally negated that a Power of Attorney, is a registrable instrument, but there is no statutory provision that makes it mandatory that Powers of Attorney, prepared for purposes of litigation, shall be registered in the Office of the Administrator and Registrar General. Therefore, I will answer the first question in the affirmative.

Meanwhile, Section 14 expressly concerns the mode of acknowledgement of registrable instruments, including Powers of

Attorney, by the Registrar General's Office. Essentially, Paragraph (C) of Subsection (1) of Section 14 of Cap.256, makes it mandatory (not directory) that a Power of Attorney, executed in foreign countries, must be notarized by a Notary Public, Commissioner of oaths etc. See the case of **S**antigie **K**amara **v. M**ilicent **M**ansaray (**N**ee **K**amara-**T**aylor, **L**yndon **K**amara-**T**aylor and **R**aymond **K**amara-**T**aylor (Civ. Appeal 48/2010) (Judgment Delivered on 12th February, 2019)}.

Alas! This is as well the legal position of other Commonwealth countries, including Ghana and Zimbabwe {see the cases of **E**dmund **A**sante **v. M**adam **K**ate **A**mponsah **S**uit N0.CA J4 /34/2007, 20th Nov. 2008, and **P**rosper **T**awanda **v. T**holakele **N**debele **J**udgment N0. HB 27/06}. Thus, in the former case, the Appellant claimed he was the sole owner of a realty at Apedwa, which he had bought from the United African Company. He got his late brother and his brother's family (including his wife) to live in the house. After his brother's death, the brother's wife claimed that the property was jointly owned by the Appellant and his deceased husband. Thus, the High Court of Ghana, adjudged the matter in favour of the Appellant.

Meanwhile, the Respondent, who was dissatisfied with the decision of the High Court, challenged it in the Court of Appeal, which overturned it. The Appellant then went to the Supreme Court of Ghana for the Court of

Appeal's decision to be overturned. However, a fundamental fact which was not in contention was that the Appellant, who was living in England, got one Nana Kwasi Twum Barima, to sue as an attorney, on his behalf with an unwitnessed Power of Attorney, executed in England. But it became quite evident to Ghana's Supreme Court that of the grounds of appeal raised in that matter, the following is very important; and it directly also resonates with the facts of the application of 30th September, 2019:

> 'The appellate court erred in its construction of section 2 of the Power of Attorney Act, 1998 (Act 548)'.

Thus, whilst rationalizing its decision in the ratio decidendi of the hitherto decided cases of **J**uxon-**S**mith **v. K**LM **D**utch **A**irlines {2005-2006} SCGLR 438, **E**dward **N**assar & **C**o. **L**td. **v. M**cVroom {1996-97} SCGLR 468, **U**ssher **v. K**panyinli {1989-90} and **A**moah **v. A**rthur {1987-88} 2GLR 87, Ghana's Supreme Court, held that the unwitnessed power of attorney was invalid. Of particular note, is the rationale of the decision as enunciated by Brobbey JSC:

> To the extent that the Power of Attorney was invalid it could not have provided legitimate basis on which Nana Kwasi Twum Barima could have prosecuted the case on behalf of the Appellant. In effect, Nana Kwasi Twum Barima

had no capacity with which to prosecute the case. The relevant rule applicable to the instant case is that where the capacity of a person to sue is challenged, he has to establish it before his case can be considered on its merits.

Moreover, the latter case, which was decided in the High Court of Zimbabwe, by Cheda J., also has a strong positive correlation, with the application of 30th September, 2019. That case was based on an application for eviction of the Respondent by the Applicant, who relied on a Power of Attorney, which though executed in the United Kingdom, was not notarized. The question for the High Court of Zimbabwe, was whether a Power of Attorney, executed in the United Kingdom, mandating an Agent in Zimbabwe, to purchase a house and sue on behalf of his Principal, is of any legal effect, if it is not notarized in the United Kingdom.

Meanwhile, the High Court of Zimbabwe's (Authentication of Documents) Rules, provides for the notarization and authentication of documents, executed out of the jurisdiction by notary publics, if they are to be considered authentic, for purposes of litigation. Thus, in tandem with that provision, Cheda J., held that:

> The particulars of the person who authenticated Prosper's {*the Applicant's, my emphasis in italics*} Power of Attorney

> indicates that he is a mere solicitor. In the absence of evidence that he is registered as a notary public, I find it difficult that he is indeed a notary public authorised to practice in terms of the laws of the United Kingdom. The office of a notary public is very important and his signature together with his seal of office is so important that it commends international recognition to an extent that the mere exhibition of a notarized document is absolutely acceptable for judicial purposes... The rules of this court have listed certain officials who are authorised to authenticate documents and those rules should be applied in Toto. In light of the above, there is no Power of Attorney before this Court..., accordingly the application is dismissed with costs.

Circumspectly, the foregoing analysis, clearly pinpoints the position of the Superior Courts of Judicature in the Commonwealth jurisdiction, including Sierra Leone, regarding the use of Powers of Attorney executed out of the jurisdiction, for judicial proceedings. Against this backdrop, I will thus answer the second question in the affirmative. Moreover, the foregoing affirmative answer, extends this analysis to a consideration of the third question, which concerns the indubitable position of the law, regarding the legality of the use of a Power of Attorney, executed out of the jurisdiction in Sierra Leone. To this question, my answer logically

follows from the aforementioned analysis; and I will categorically say that the use of a Power of Attorney, executed out of the jurisdiction, does not have any legality in Sierra Leone, if it is not notarized, as expressly contemplated and articulated in the said Paragraph (C) of Subsection (1) of Section 14 of Cap.256, of the Laws of Sierra Leone, 1960.

1.3.2 Question Four

The fourth question relates to whether Exhibit MB3 is accordingly registered, in accordance with the relevant provisions of Cap.256 of the Laws of Sierra Leone, 1960. Contextually, Exhibit MB3, which is the Power of Attorney, pursuant to which this action is instituted, was indisputably executed out of Sierra Leone. It was factually executed (in London) by Zainab Vandi of 126 Allison Road, Haringy, London, England, United Kingdom; on behalf of Modiboh Jebbo of 8 Vandi Close, Kabassa Lodge, Juba Hill, Freetown, in the Western Area of the Republic of Sierra Leone. Meanwhile, a deconstruction of the text (the Power of Attorney), which inter alia contains the foregoing content, depicts that it is neither signed, nor stamped by a Notary Public in the United Kingdom, as legally required by the requisite provisions of the said statute.

Hence, Exhibit MB3 is not notarized. That in itself, amounts to a contravention of the apposite statutory provisions, accordingly

referenced above. See also the cases of **S**antigie **K**amara **v. M**ilicent **M**ansaray (**N**ee **K**amara-**T**aylor, **L**yndon **K**amara-**T**aylor and **R**aymond **K**amara-**T**aylor (Civ. Appeal 48/2010), **E**dmund **A**sante **v. M**adam **K**ate **A**mponsah **S**uit N0.CA J4 /34/2007, 20th Nov. 2008, and **P**rosper **T**awanda **v. T**holakele **N**debele **J**udgment N0. HB 27/06}. And this contravention can be dubbed an irregularity that should have forestalled the registration of the said Exhibit MB3 (Power of Attorney) in the Office of the Administrator and Registrar General. However, Exhibit MB3 has already been registered; even though it should not have been; had those who did the registration, really exercised due diligence; and conducted the registration process, in tandem with the dictates of Paragraph (C) of Subsection 1 of Section 14 of Cap. 256, of the Laws of Sierra Leone, 1960. Thus, I will therefore answer the fourth question in the negative.

1.3.3 Questions Five and Six

Essentially, the foregoing negative answer to the fourth question, pummels my analysis to the search for the answers to questions five and six, which encompass the issues of whether the presumption of legality/regularity, can hold good in a circumstance, wherein the compliance with a statutory provision is contended; and whether the objection raised in the motion of 30th September, 2019, is shrouded in a mere technicality. Meanwhile, the issues of presumption of legality and

regularity, are the principal thrust of what must be determined in question five; against the backdrop of the protestation of the Respondent's Counsel.

Thus, Counsel's reference to Halsbury's Laws of England, Fourth Edition, Reissued Vol. 17 (1) at Paragraph 583, under the rubric Legality and Regularity, appears to be quite compact and relevant, to the negation of the application of 30th September, 2019, but it should be noted that the authors' analysis on both issues, is embedded in the cocoon of the common law. Alas! The authors indeed referenced a plethora of decided cases, including Monke **v.** Butler (1614) 1 Roll Rep 83; Vatcher **v.** Paull (1915) A.C 372 PC, Whitemores (Edenbride) Ltd. **v.** Stanford (1909)1 Ch. 427 etc., justifying the circumstances, in particularly the laws of real property, equity and trusts and succession and inheritance, in which the presumption of legality and regularity, had held sway.

However, there is nothing in the foregoing authorities and the many other cases cited in Paragraph **583** found in pages **283** and **284** of same, supporting the submission that in a circumstance, wherein an express statutory provision, requires that if something shall be done, which has not been done, either as a result of the absence of due diligence or otherwise, the rebuttable common law presumption of legality and regularity, shall take precedence.

Essentially, the manifest contravention of Paragraph (C) of Subsection 1 of Section 14 of Cap.256 of the Laws of Sierra Leone, 1960, is a very clear irregularity in the registration process of Exhibit MB3 that cannot be saved by the presumption that because there is evidence of its registration, therefore that registration was accordingly done. The law unambiguously stipulates how the registration should be done. Since the registration was not accordingly and unequivocally done, such registration cannot be presumed to have been accordingly regularly done. Thus, I will answer the fifth question in the negative. Regarding the sixth question, I will say the objection raised in the motion of 30th September, 2019, is not shrouded in a mere technicality; it factually and legally dovetails, with the statutory provisions, articulated above.

1.3.4 Question Seven

Furthermore, concerning the seventh question, there is nothing in Cap. 13 of the Laws of Sierra Leone, 1960 that Exhibit MB3 transgressed. Cap.13 does not deal with the registration of instruments; the law that focuses on such, has already been clearly explicated above. Moreover, Cap.13 is an Ordinance that provides for the appointment of Notaries Public authorised to act as such, by the Master of Faculties and for other purposes in relation to the Performance of Notarial Functions.

Therefore, I will negate the submission of Counsel for the Applicant on this point; and I will for sure answer the seventh question in the negative.

1.3.5 Question Eight

Moreover, I will also answer the eighth question in the negative; and simultaneously repudiate the argumentation of Counsel for the Applicant on this point as well. Certainly, Section 17 of Act N0.6 of 1991, encapsulates a plethora of circumstances that are cognate with the democratic and constitutional right to liberty, which is one of the fundamental civil and political rights, which is said to be indivisible and inalienable; and cannot be taken away from anyone, except by law. The section specifically enunciates in its numerous paragraphs the circumstances, pursuant to which the right to liberty is protected and the instances in which that right is circumscribed. Therefore, Paragraph (E) of Subsection (1) of Section 17, which Counsel has relied on, does not have anything to do with any reason, regarding why this Bench should or should not grant the application of 30th September, 2019.

1.4 <u>The Final Analysis</u>

Nonetheless, the central issue that is to be determined, at this final stage, is whether the writ of summons, should be struck out; on the basis of the irregularity expatiated above. Meanwhile, should this Honourable Court, overwhelmingly determine the application of 30th September,

2019, on the basis of the fact that Exhibit MB3 is not notarized, the writ of summons, will definitely not survive; it will certainly be struck out. But, is that sufficient for the writ of summons to be struck out? However, is there any reasonable, fair and just rule of law that this court can invoke (in the interest of justice) to salvage the writ of summons, from drowning or being burned?

These questions are germane to the analysis that informed the answer to question four articulated above. However, from that analysis, two other questions are discernible: does the contravention of Paragraph (C) of Subsection (1) of Section 14 of Cap.256, as Amended by Act N0.6 of 1964, amount to a nullification of Exhibit MB3? What is the procedural implication of the nullification of Exhibit MB3 in terms of the capacity of Modiboh Jebbo, who is the Plaintiff's representative in this action?

Significantly, I will certainly say, the contravention of the said statutory provision, amounts to a nullification of only the use of Exhibit MB3. That nullification is born in the womb of the irregularity that unpinned the processes, leading to its registration. But procedurally, the nullification, does not affect the contents of the writ of summons, commencing this action; for it was issued and served on the Applicant, in accordance with the requisite rules of procedure, enshrined in The High Court Rules, 2007, Constitutional Instrument N0. 25 of 2007. Further, the foregoing

nullity does not negate the Respondent's representative's capacity in this action. The common law is quite clear on this. There are various approaches that can culminate in the appointment of agents: Agents are appointed expressly, by implication, by ratification, by estoppel and by necessity, depending on the specificities of the circumstances that underscore their appointments' (R. G. Lawson, 1993: 108- 110).

In this case, there is evidence that the Respondent's representative (in the person of Modiboh Jebbo) is appointed by her as agent. Thus, his appointment at common law subsists, despite the nullification of the use of Exhibit MB3, because an agency relationship can even be impliedly established. Perhaps, it is in recognition of this common law principle that Section 1 (1) of Cap. 256 as Amended by Act N0.6 of 1964, makes it quite conspicuous that 'there is no real legal requirement for Powers of Attorney to be registered if they concern court proceedings' (N. C. Browne-Marke, op .cit: 4). In fact, it is clear from the evidence deposed to in the supporting affidavit that the person that executed the nullified power of Attorney is the Respondent. There is as well no doubt about the connection between the Respondent and Modiboh Jebbo. And there is no evidence before this Honourable Court, challenging the actual agency relationship subsisting between the Plaintiff and her representative; other than the lack of notarization of the nullified Power

of Attorney. Therefore, I really do not think that it would be sufficient to strike out the writ of summons on the basis of this alone.

1.5 Integrative Conclusion

Circumspectly, I will not give credence to the application of 30th September, 2019, but I will award a cost of one million five hundred thousand Leones (Le 1,500,000) to Counsel for the Applicant (G. Conteh Esq.), for raising the issue of the non- notarization of Exhibit MB3. Finally, I will stay the proceedings; until the provision of Paragraph (C) of Subsection (1) of Section 14 of Cap. 256 is complied with.

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

1/7/2020

Justice of the Superior Court of Judicature of Sierra Leone.