C.C. 168/09 2009 D No. 7

IN THE HIGH COURT OF SIERRA LEONE

(LAND AND PROPERTY DIVISION)

BETWEEN: ABDUL RAHMAN DAVIES - PLAINTIFF

AND

1. MOHAMED BANGURA - DEFENDANTS
2. ABU BAKARR BANGURA

N D TEJAN-COLE ESQ for the Plaintiff

JAMES F SESAY ESQ for the Defendants

JUDGMENT

1. By a Writ of Summons dated 2 June,2009 the Plaintiff through his lawfully appointed Attorney HAJA SARIEU DAVIES brought an action against the Defendants for Declaration of Title to land measuring 0.5079 acre described and delineated in survey plan LS817/78 dated 29 May,1978 drawn and attached to Deed of Voluntary Conveyance dated 17 June,1978 and duly registered as No.91 at page 55 in volume 135 of the Record Books of Voluntary Conveyances kept in the Office of the Registrar-General, Freetown. The Plaintiff also asked the Court for Recovery of possession of the said property, an Injunction, Damages for Trespass, Special Damages and the Costs of the action.

2. According to the Plaintiff, this Writ was served on both Defendants by JOHN GBLA, Bailiff in the Under-Sheriff's Office, on 20 June,2009. Mr GBLA deposed to an affidavit of service on 30 June,2009. On 30 September,2009 MR TEJAN-COLE deposed to an affidavit in which he deposed that on Friday 10 July,2009 and 29 September,2009 he personally made searches in the Registry to find out whether appearance had been entered for and on behalf of the Defendants, and he found out that no appearance had been entered for and on their behalf. He therefore proceeded to enter Judgment in Default of ~~Defence~~ appearance against both Defendants on 4 October,2009 for Recovery of Possession of land measuring 0.2300 acre or 2 town lots, which represented the portion of

land the Defendants had trespassed on, and to which they were laying claim.

3. On 19 November,2009 M S TURAY & ASSOCIATES entered appearance on behalf of the Defendants, and on 23 November,2009 filed a Notice of Motion bearing the same date, asking this Court to SET ASIDE the said Judgment in Default on the grounds that it was Irregular, and that the Defendants have a bona fide defence to the Plaintiff's claim. They also asked for Leave to file their Defence out of time; and for a Stay of Proceedings , and a Stay of Execution of the said Judgment pending the hearing and determination of this Application.

4. The Application is supported by the affidavit of MR SESAY deposed and sworn to the same day, i.e. 23 November,2009. Exhibited to that affidavit are: "A" a copy of the Writ of Summons; "B1&B2" are copies of the memorandum and notice of appearance entered; "C" is a copy of a Statutory Declaration made on 20 May,2004 and duly registered as No.40/2004 at page 118 in Volume 48 of the Record Books of Statutory Declarations kept in the Office of the Registrar-General, Freetown. Attached to it, is survey plan of which more will be said anon. It is numbered LS637/68 and is dated 2 September,1968. The property measures 0.6577 acre, and is described as situate, lying and being at Off Old Railway Line, Tengbeh Town. It is said to be owned by MR AMARA BANGURA and MRS MINAH ESTHOR BANGURA. "D" is a copy of Letters of Administration granted by the High Court of Sierra Leone in its Probate jurisdiction on 7 March,2007 to the Defendants, to administer the estate of their late mother MRS MINAH BANGURA. The realty was valued at Le3million, though the total estate value was later re-sworn at Le8million plus on either (it is not clear on the face of the copy exhibited) 13th or 30th January,2009. The curious thing about this Grant, is that the Declaration of estate made by both Defendants on 1 March,2007 states that Valuer and Appraiser was OLU CAMPBELL; but the Valuation Certificate attached to this Declaration is that prepared and signed by FRANKLYN KENNY of KENLICE GENERAL SERVICES. Both Valuers are well-known to me, as they ply their respective services here in the Law Courts' Building, separately.The Certificate dated 16 Janaury,2007 describes the property valued, as "empty land". This description is of some importance for reasons which will appear in the next sentence. In paragraph 7 of his affidavit, MR FORNA SESAY deposes that "*I am reliably informed by the said*

Defendants/Applicants and verily believe that the Defendants/Applicants have always lived in the premises built on this said property, without any interruption and/or interference from anyone whatsoever, until the Plaintiff/Respondent started raising issues concerning a common boundary between them." If the property Defendants are claiming is that Declared in the Grant, then that property is supposed to be a vacant plot of land, and not one which has been developed for Defendants to live on.

5. "E1" is a copy of a letter dated 3 November,2009 addressed by Mr Tejan-Cole, to the Defendants, forwarding a copy of the Judgment in Default dated 4 October,2009. "E2" is a copy of the Judgment. "F1" is a copy of John GBla's affidavit of service deposed and sworn to 30 June,2009. "F2" is a copy of Mr Tejan-Cole's affidavit deposed and sworn to on 30 September,2009. "G" is a copy of the proposed Defence and Counter Claim. In this proposed pleading, the Defendants aver, inter alia, that it is the Plaintiff who has been trespassing on their property and not the other way round.

6. In paragraphs 8 and 9 of his affidavit, Mr Sesay deposes that he has been informed by the Defendants, and does verily believe, that process was never served on the Defendants, and that they only got to know about the Plaintiff's claim on 19 November,2009 when a little girl handed over to one of them, a copy of Mr Tejan-Cole's letter of 3 November,2009. Mercifully, this mysterious girl has not been named nor has she shown up in these proceedings. Also, Mr Sesay deposes that the Defendants inform him, and he verily believes, that when they got the letter and the Judgment, they came to the Law Courts' Building, and went in search of Mr. Gbla. On facing Mr Gbla, he could not identify either of them. This averment, necessitated the calling of Mr Gbla for him to be cross-examined on his affidavit. Mr Sesay also deposes that the Defendants say they never signed, nor indorsed the Writ of Summons. Since our Rules do not require a Defendant to sign or indorse a Writ to certify that service has been effected on him, I shall say no more about this particular matter, save to categorise it as the decoy and red-herring it is intended to be. Mr Sesay also repeats in paragraph 11 that the Defendants have always lived on the property in dispute.

7. On 24 November,2009 ALHAJI M KAMARA, Solicitor of 43 Brook Street, Freetown again entered appearance on behalf of both Defendants, notwithstanding the fact that appearance had already been entered on

their behalf by Messrs Turay & Associates. Mr Kamara, no doubt in pursuit of the instructions he had received from the Defendants, went on to file, and to serve, a Notice of Motion dated 2 December,2009 supported by an affidavit deposed and sworn to by the 1st Defendant, asking for the very same reliefs Turay & Associates had asked this Court for. During the course of hearing on 4 December,2009 I asked the 1st Defendant in open Court – see page 3 of my minutes -whether he had deposed to this affidavit; his answer was no. I had no difficulty in striking out that Application with Costs in the sum of Le250,000 to be paid by the Defendants, as it constituted an abuse of the process of the Courts, and it shows mala fides on the part of the Defendants.

8. The Plaintiff filed an affidavit in Opposition to the Defendants' Application, deposed and sworn to by his wife and Attorney on 1 December,2009. Exhibited to that affidavit are: "SD1" a copy of a letter dated 16 March,2009 from Mr John Coker on behalf of the Acting Director of Surveys and Lands, to the LUC, Congo Cross Police Station. "SD2" is a copy of Search Fee Receipt dated 10 July,2009; and "SD3" is a copy of another Search Fee Receipt dated 29 September,2009; and finally, "SD4" is a copy of Mr Tejan-Cole's affidavit of Search deposed and sworn to on 30 September,2009.

9. The 1st Defendant filed an affidavit in Reply deposed to by himself on 3 December,2009. That affidavit deals with, and attempts to rebut or refute allegations made by the Plaintiff's Attorney in her aforementioned affidavit of 1 December,2009. He deposes that the "SD1" was never sent nor shown to himself nor to his brother; that Mr Coker went to their property on 3 March,2009 and threatened he and his brother. He deposes also that it is not true that LS637/68 is not recorded in the books of the Ministry of Lands; and that in fact, representatives of that Ministry had testified as witnesses on their behalf in another matter concerning the same property before, first HALLOWAY,J and then subsequently, SEY,J. In paragraph 11 he deposes that "....*In fact our late mother .....lived on this land long before her death, together with her brother, the late Amara Bangura and even gave birth to us in the premises she built on the land. Throughout all those periods, they lived on the land uninterrupted and undisturbed.*"

10. He deposed and swore to another affidavit on 9 December,2009 by virtue of an Order of this Court. To that affidavit is exhibited "MB1" a copy of the Statutory Declaration dated 20 May,2004.

11. As a result of the contention that the survey plan attached to that Statutory Declaration was not genuine, in addition to the Court calling as a witness, MR JOHN COKER, Mr Tejan-Cole subpoenaed the ~~Registrar~~ Registrar-General to produce to the Court, Deed of Conveyance dated 19 August,1968 and duly registered as No.466/68 at page 40 in Volume 232 of the Record Books of Conveyances and expressed to be made between one Gilbert O'Connor, and Melville A Lewis. To that Deed is attached Survey plan LS637/68 dated 17 July,1968 signed by Mr Oluwole.

12. There are two main contentions here. The first is whether I should set aside the Writ ex debito justitae because of non-compliance with the Rules, in that the Defendants were not served with the Writ of Summons. The other is, whether I should set aside the Judgment in Default on the ground that the Defendants have a good Defence to the Plaintiff's claim. As regards the first contention, the relevant evidence is the averments of the Defendants contained in Mr Sesay's affidavit of 23 November,2009 on the one hand; and on the other hand, there is the evidence on oath of both the 1st Defendant, and of Mr Gbla. In his evidence on oath, the 1st Defendant denied consulting Mr Alhaji KAMARA. He could not recall seeing Mr Gbla together with Mr Tejan-Cole's clerk. He denied abusing Mr Gbla. He said he was 35 years old, and was not yet born in 1968. In his evidence, Mr Gbla narrated what transpired between himself and the Defendants on 20 June,2009 and when they came to his office downstairs. I am satisfied that he is speaking the truth, and that he served both Defendants in the manner described by him. Too many litigants think nowadays that the best way of getting their own way, and of frustrating Plaintiffs, is to deny service on them of process. Thus, the argument that the Defendants did not indorse nor sign the Writ of Summons. That argument does not find favour with me; and is an indication that indeed the Defendants were served with the Writ. I cannot therefore set aside the Writ ex debito justitiae.

13. As regards the next contention, that the Defendants have a good defence, I shall consider the evidence which has been led before me on affidavit, and viva voce. Order 13 Rule 9 of the High Court Rules provides that "*Where Judgment is entered pursuant to this Order, it shall be lawful for*

the Court to set aside or vary such judgment upon such terms as may be just." It says it is lawful for me to set aside the Judgment obtained in default, but it does not say that I must do so in every case. It imports a discretion, and in deciding how such a discretion should be exercised, it is necessary to look at the practice. Firstly, I have to decide whether the Judgment is Regular or not. There has been no complaint that the judgment is irregular by itself: I can find no evidence myself, to support such a complaint. Nor is it irregular because of non-service of the Writ: I have already decided that I believe on a balance of probabilities that the Writ was served on both Defendants. The WHITE BOOK 1999 says at page 157 in the notes to Order 13 para 13/9/7 under the rubric Regular Judgment: "*If the Judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit on the merits i.e. an affidavit stating facts showing a defence on the merits. At any rate, where such an application is not thus supported, it ought not to be granted except for some very sufficient reason.... For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence.... On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false. The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion."*

14. At page 160 of the WHITE BOOK in the notes in paragraph 13/9/18 the principles upon which this Court should act in exercising its discretion as distilled from the Judgment of the Court of Appeal in THE SAUDI EAGLE [1986] 2 Lloyd's Reports 221 at 223 CA are set out: "(a*) it is not sufficient to show a merely arguable defence that would justify leave to defend under O.14 (Order 16 in our own HC Rules,2007); it must both have "a real prospect of success" and "carry some degree of conviction". Thus, the Court must form a provisional view of the probable outcome of the action. (b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*

15. I must first ask myself, does the proposed defence and counter-claim have a real prospect of success and carries some degree of conviction? The

Defendants' joint defence rests on the Statutory Declaration dated 20 May,2004. That Declaration witnessed that the property at Off Old Railway Line, Tengbeh Town was owned by both MRS BANGURA and her brother AMARA BANGURA. Yet, both Defendants, in the Letters of Administration declared the same to be her sole property. There is no indication or showing in the Grant, that the value stated in the Declaration of estate represents one-half of the value of the whole property. It follows that the Defendants declared that the property belonged to her alone, and this was clearly wrong. No account has been given of what happened to AMARA BANGURA. For all we know, he may still be alive. Whatever might be the case, that Declaration of estate cannot stand; and if it cannot stand, the substratum of the Defendants' case disappears.

16. Further, there is the discrepancy between the Declaration of Estate, and the Valuation Certificate: the Declaration refers to the Valuer being OLU CAMPBELL: whilst the Valuation Certificate was clearly prepared and signed by FRANKLYN KENNY. Again, this is not an error which can be cured without setting aside the whole Grant. Deception permeates the whole grant. Why describe the property as empty land, whilst the Defendants are claiming that they were born in a structure which was there.

17. The next point, is perhaps the most important. MINAH ESTHOR BANGURA thumb or finger printed the Statutory Declaration, showing that she was an illiterate. She is now dead. Section 2 of the Illiterates Protection Act, Chapter 104 of the Laws of Sierra Leone, 1960 provides that where a document is written by a person at the request of an illiterate, that person shall also write his own name as the writer thereof, and his full and true address. By doing so, it shall be taken that he was so instructed to write, and that what he had written had been read over and explained to the illiterate whose mark appears on the document. There is no indorsement or memorandum by, or above, or below the thumbprint on the line below which the name MINAH ESTHOR BANGURA appears on the Statutory Declaration. The full and true address of the Commissioner for Oaths before whom the Declaration was made, does not appear by or above or below her name. There is nothing in that document to indicate that the person described there as MINAH ESTHOR BANGURA knew anything about what she had been called upon to thumb or finger print. I tried to find some authority dealing with this issue, and during the course of my

researches, I was able to lay hands on the case of JOINT VENTURE CONSTRUCTION COMPANY LTD v CONTEH [1970-71] ALR SL 145 C.A. where, at page 153, TAMBIAH,JA, tried to explain the consequences resulting from failure to comply with requirements of Section 2 of that Act. He was of the view that the transaction would not be rendered void for non-compliance. The statutory provision merely penalised the maker of the document. There, he was dealing with the situation where the maker of the document was an incorporated body, and for his part, he was of the view that the penalty imposed in Section 3 of the Act, could not apply to a corporate body, but only to a natural person. But, he had earlier found, at page 151 that the second Plaintiff who was relying on Section 2 of the Act had full knowledge of the contents of the document he had signed. Further, a Paramount Chief was present throughout the negotiations, and signed the document as a witness. Here, the Deed is said to have been prepared by a Solicitor, Mr Sahr Fanday Turnar of 21 Upper Brook Street, Freetown. But to render it effective and therefore registrable, it had to be made before a Commissioner for Oaths. The usual illiteracy clause was not inserted by Mr Fanday Turnar, nor, by the Commissioner for Oaths. It follows, that at the time MINA ESTHOR BANGURA thumb or finger-printed the Deed, she could not have been aware of its contents.

18. Also, there is the incontrovertible evidence to be gleaned from Court exhibit 1, the copy of a page in the Record Book of Entry points tendered in evidence by Mr Coker. Survey plan LS637/68 is shown to be in respect of land owned by one Melville Lewis situate off Blackhall Road. The plan was prepared by C A Williams. If this survey plan bears this number, then the LS number in the Statutory Declaration cannot be correct.

19. Lastly, in that Statutory Declaration MINAH BANGURA and the other three Declarants, are said to have declared that Minah's father PA SIAKA BANGURA who died on 20 January,1974 had given MINAH BANGURA and AMARA BANGURA that property before his demise. The survey plan attached to that Declaration is purportedly dated 2 September,1968. But the Declaration was only made in 2004 nearly 40 years later. The Law does not recognise parol gifts of land. It follows that, even if it is true that PA SIAKA BANGURA had intended to give this property to AMARA and MINAH, both of them could not be said to have held, or to have been entitled to the fee simple estate, or to the right to possession of the same

in 1968 when the survey plan was purportedly drawn. Title remained in Pa Siaka until his death in 1974.

20. For these several reasons, I do not believe Defendants have a good defence on the merits, and their Application must therefore fail. The Application dated 23 November2009 is therefore dismissed with Costs to the Plaintiff, such Costs to be Taxed if not agreed.

N C BROWNE-MARKE

Justice of Appeal

23 March,2010.