

**SAWANEH v BAYOH**

SC

**SUPREME COURT OF SIERRA LEONE**, Supreme Court Civil Appeal 6 of 1979, Hon Mr Justice E Livesy Luke CJ, Hon Mr Justice CA Harding JSC, Hon Mr Justice OBR Tejan JSC, Hon Mrs Justice AVA Awunor-Renner JSC, Hon Mr Justice S Beccles Davies JSC, 3 July 1980

- [1] Civil Procedure – Appeals – Specific performance not argued before Court of Appeal – No basis for Court of Appeal to make ruling without hearing arguments – No basis for Supreme Court to consider appeal on issue of specific performance – Court of Appeal Rules 1973 r 9(6)**
- [2] Land – Sale of land – Specific performance – No evidence that contract of sale properly completed – Damages appropriate – No basis to award specific performance in default of payment of damages – No authority for court to place time limit for damages to be paid**

On 6 February 1974 the respondent agreed to sell premises to the appellant for Le8,200. The respondent paid this amount but failed to give possession. The appellant took action seeking specific performance and vacant possession. The trial judge refused specific performance on the basis that the contract of sale was incomplete and ordered that the respondent repay the money and pay the costs of the action. On appeal, the Court of Appeal affirmed the trial judge's decision and also ordered damages of Le4,000 for loss of bargain and specific performance if the respondent failed to make payment within 2 months. The appellant appealed, seeking specific performance of the sale contract.

**Held, per Tejan JSC, dismissing the appeal:**

1. As the appeal to the Court of Appeal was limited to the question of damages and there were no arguments against the decision of the trial judge to not grant specific performance, there was no basis for the appellant to raise specific performance as ground of relief before the Supreme Court. There was nothing on the record to show that the parties argued on the issue of specific performance before the Court of Appeal. The Court of Appeal should have averted its mind to r9(6) of the Court of Appeal Rules 1973 and invited argument on specific performance before dealing with this issue. *Conteh v Kamara* [1974-82] 1 SLBAR 244 applied.
2. There was no authority to support the Court of Appeal's order placing a time limit within which damages were to be paid. Remedies such as seeking a judgment debtor summons and writ of fieri facias were the appropriate ways for a successful litigant to recover an award of damages.
3. The Court of Appeal was wrong to award specific performance as an alternative in default of payment of damages. When the law states that damages may be awarded in lieu of specific performance, it does not mean that the remedies may be awarded in the alternative.
4. Both the trial judge and the Court of Appeal clearly came to the conclusion that this was a proper case where an award of damages rather than specific performance would achieve justice. References by the Court of Appeal in its ruling to specific performance were mere surplusage.

**Cases referred to**

*Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473  
*Conteh v Kamara* [1974-82] 1 SLBAR 244  
*North Staffordshire Railway Company v Edge* [1920] AC 254  
*The Tasmania* (1890) 15 AC 223  
*Thom v Bigland* (1853) 8 Ex 725

**Legislation referred to**

*Court of Appeal Rules 1973 r 9(6)*  
*Illiterates Protection Act (Cap 104)*

**Other sources referred to**

*Halsbury's Laws of England* [3rd Ed] Vol 36, para [359], p 263

## Appeal

This was an appeal by Alhaji Foday Sawaneh seeking to overturn a refusal by the Court of Appeal to order specific performance of a sale of land contract he had entered into with the respondent, Alhaji Murray Bayoh. The facts appear sufficiently in the following judgment of Tejan JSC.

*Mr Ade Renner-Thomas for the appellant.*

*Mr TS Johnson for the respondent.*

**TEJAN JSC:** By an agreement dated 6 February 1974 the respondent agreed to sell premises situate and lying at 33A Kainkordu Road, Koidu Town in the Kono District of the Eastern Province of the Republic of Sierra Leone for the sum of Le8,200.00 to the appellant, who lived at No 14, Section 11 Koidu Town in the Kono District in the Eastern Province at Sierra Leone. The agreement stipulated that the respondent was to remain in possession of the said premises for a period of six months without payment of rent and that the said period was to end on 31 July 1974. It was witnessed by several witnesses who thumb-printed it. The appellant then paid the agreed sum of Le8,200.00 to the respondent.

After 31 July 1974, the respondent neither gave up possession nor conveyed the premises to the appellant who then instituted proceedings against him by the issue of a writ of summons dated 18 April 1975, claiming a decree of specific performance of the contract of sale, vacant possession of the premises and mesne profits from 1 August 1974 to the date of giving vacant possession.

The respondent admitted receiving the sum of Le8,200.00 but asserted that the sum of Le8,200.00 was received by him by way of a pledge or mortgage on the house which was a family property. The respondent, however, agreed to pay into court the full amount of Le8,200.00.

On 22 January 1976, the case came before Thompson-Davies J for trial, and who after having heard the evidence and arguments on both sides, delivered judgment on 13 July 1977 in the following terms:

“For all these reasons I find myself unable to grant the relief sought by the plaintiff. The plaintiff is entitled to have his money since to my mind Exhibit A seems spurious and incomplete. I cannot find my way clear to award any damages. While refusing the plaintiff’s request for specific performance I would order that the defendant do refund the sum of Le8,200.00 to the plaintiff and that he pays the costs of this action. Such costs to be taxed.”

In support of his conclusion, he relied on the passage in *Halsbury’s Laws of England* [3rd Ed] Vol 36, para [359] at p 263 which reads thus:

“The remedy of specific performance is thus in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. The remedy is special and extraordinary in its character and the court has a discretion to grant it, or to leave the parties to their rights at law. The discretion is however not an arbitrary or capricious discretion; it is a discretion to be exercised on fixed principles in accordance with the previous authorities. The judge must exercise his discretion in a judicial manner. If the contract is valid in form and has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course, even though the judge may think it involves hardship. “

The trial judge referred to para [389]:

“Where it is sought to enforce specific performance of a contract, the court must be satisfied that there is a concluded contract in fact; that the contract so concluded is not incomplete by reason that the parties have failed to agree expressly or by implication on some essential matter, or by reason that it fails to comply with statutory requirements relating to contract; that the contract is precise and certain or, in other words, that although all essential matters may have been dealt with, there is not such uncertainty and vagueness that exact performance cannot be ordered.”

In the course of his judgment, the learned trial judge said:

“Now the contract relied on by the plaintiff is contained in Exhibit A which without doubt speaks against the Illiterates Protection Act (Cap 104) of the Laws of Sierra Leone; that being so it is not sufficient to transfer any interest in land. Taking a closer look at the said document it seems to me that it was never signed by the defendant, that is the party to be charged, or his agent; this is in clear breach of the statutory requirements, s 4 of the Statute of Frauds Act 1677. It is true that the name of the defendant is type-written on the document but on the thumb-print against which his name is typed is the name Alhaji Mohamed Saccoh (RTP). This makes it doubtful as to whose thumb-print is affixed to it. Since the said Exhibit A fails to comply with these statutory requirements I would submit that the alleged contract is incomplete”.

It is against the judgment that the appellant appealed to the Court of Appeal on the following grounds:

1. that the learned trial judge erred in holding that a breach of the Illiterates Protection Act (Cap 104) of the Laws of Sierra Leone bars the transfer of any interest in land;
2. that the learned trial judge was wrong in law in refusing to award damages to the plaintiff in substitution for specific performance;
3. that the judgment is against the weight of the evidence.

On 6 July 1979, the judgment of the Court of Appeal was delivered by Navo JA. The Court of Appeal, after having agreed with counsel’s contention in ground 1, then proceeded to consider ground 2.

It seems to me that the wording of ground 2 is quite clear, and that no other meaning could be attached to it than that there is a clear appeal against the refusal of the trial judge to award damages.

But the Court of Appeal, instead of dealing with ground 2 as stated in the grounds of appeal, went exhaustively into the law relating to specific performance and then made the following orders:

1. In the absence of evidence of the value of the property at the date of the judgment, we order the respondent to pay to the appellant his deposit of Le8,200.00 plus 5% interest per annum thereon from 1 August 1974 to date.
2. We order the respondent to pay to the appellant the sum of Le4,000.00 damages for loss of his bargain.
3. That the amount on this judgment be met within two months from today’s date, in default of payment, we order specific performance of the contract entered into on 6 February 1974 that the respondent do deliver vacant possession and convey to the appellant the property referred to and known as 33A Kainkordu Road, Koidu in the Eastern Province of the Republic of Sierra Leone.
4. We award the appellant the costs of this action in this court and in the court below, such costs to be taxed.

When the appeal came before this court, Mr Johnson raised a preliminary objection that the appellant should not be allowed to argue paragraph 5 of the notice of appeal. This paragraph which falls under the relief sought reads:

“(i) that the judgment of the Court of Appeal to the extent that it awarded damages instead of specific performance be set aside and reversed;

(ii) that judgment be entered for the appellant for (a) specific performance, (b) possession and (c) mesne profits.”

Counsel’s contention is that Mr Renner-Thomas, counsel for the appellant cannot base any argument on the reliefs sought since there has been no appeal before the Court of Appeal against the refusal of the learned trial judge to grant a decree of specific performance, and that the appeal before the Court of Appeal was against the refusal of the trial judge to award damages. In effect, the appellant’s counsel would be introducing new matter which was never argued before the Court of Appeal. This Court upheld counsel’s contention and decided to give a ruling later.

There is a long line of well-established authorities which support the contention of the respondent's counsel. See *North Staffordshire Railway Company v Edge* [1920] AC 254; *Thom v Bigland* (1853) 8 Ex 725; *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473; *The Tasmania* (1890) 15 AC 223.

However, r 9(6) of the Court of Appeal Rules clearly states that "notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant. Provided that the Court shall not rest its decision on any ground not set forth by the appellant unless the parties have had sufficient opportunity of contesting the case on that ground."

There is nothing on the record to show that the parties argued before the Court of Appeal on the issue of specific performance. However, Mr Renner-Thomas in reply, conceded that he could find no material to enable him to invoke r 9(6) of the Court of Appeal Rules. Indeed, if the Court of Appeal decided to deal with the issue of specific performance, it could have invited both counsel to address it on the issue, but according to the record this was not done. But the Court of Appeal, contrary to well-established principles and in particular to r 9(6) of the Court of Appeal Rules went on to deal exhaustively with the issue of specific performance and making references to irrelevant authorities which I think would be futile to mention.

This court in the case of *Conteh v Kamara* [1974-82] 1 SLBAR 244 dealt with a similar matter, and Livesey Luke C.J. in his judgment said:

"In my opinion, in the circumstances just related, the Court of Appeal should have adverted its mind to r 9(6) of the Court of Appeal Rules 1973 and invited argument on special damages".

This Court therefore upholds the submission of the respondent's counsel.

Having disposed of the issue of specific performance, there are two matters which I think I have to consider particularly with regard to the orders made by the Court of Appeal.

The first is whether the Court of Appeal was right, having concluded that an award of damages would meet the ends of justice, to limit the time within which the amount awarded should be paid. I have made exhaustive research in this aspect but I have not been able to find any authority to support the order made by the Court of Appeal. Even in the absence of authority, but from my own experience there are remedies provided by law to enable a successful litigant to recover an award of damages. Some of these are by way of the issue of judgment debtor summons and writ of fieri facias. In my opinion therefore this order of Court of Appeal was untenable.

The next point is whether the Court of Appeal was right in awarding damages and then in default specific performance. Mr Renner-Thomas attacked this order on the ground that it was wrong for the Court of Appeal to do so.

Specific performance is an equitable remedy, given by the court to enforce against a defendant the duty of doing what he has agreed by contract to do.

Damages in breach of contract is a common law remedy, and it is my view that when the law states damages may be awarded in lieu of specific performance, it does not mean that the remedies may be awarded in the alternative. I uphold Mr Renner-Thomas' argument on this point that the Court of Appeal was wrong to award damages, in default of payment thereof the alternative of specific performance.

Learned counsel for the appellant submitted that in view of the erroneous order, particularly, order 3 by Court of Appeal the appeal should be allowed and an order for specific performance made because he contended that the Court of Appeal must have come to the conclusion that this was a suitable case for an order for specific performance. In my opinion, that cannot be so. Because the Court of Appeal in its judgment clearly came to the conclusion that this was a proper case where an award of damages rather than an order of specific performance would meet the end of justice. Therefore in my opinion, any reference made by the Court of Appeal in its order to specific performance was mere surplusage. This court has ample power to amend orders of lower courts, and

by virtue of those powers I propose that we amend the orders of the Court of Appeal by deleting order 3.

Subject to this, I would dismiss the appeal.

**Hon Mr Justice E Livesey Luke CJ:** I agree. **Hon Mr Justice CA Harding JSC:** I agree. **Hon Mrs AVA Awunor-Renner JSC:** I agree. **Hon Mr Justice S Beccles Davies:** I agree.

Reported by Anthony P Kinnear