

IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

M.A. BELOKU SESAY -- PLAINTIFF

AND

AMINATA THOMAS -- DEFENDANT

Tuesday 21st

March 2006

Before the Hon. Mrs.

Justice A. Showers J.

Case Called

M.A. Beloku Sesay Esq. --- Plaintiff

E.M. Turay Esq. for Defendant -- absent

Defendant present

RULING

In this matter, the Defendant has filed a Notice of Motion dated 24th August 2005 seeking a stay of execution of the Judgment in default of Appearance dated 8th January 2001 and all subsequent proceedings in the matter and that she be given leave to defend the matter on the ground that the Defendant / Applicant has a good and triable defence to the action herein. I must at this point mention that the applicant has failed to apply for the Judgment in default of appearance to be set aside.

In support of the application is affidavit of Edward M. Turay sworn to on 24th August 2005. In his affidavit the defendant swore to the fact that he is solicitor for the Defendant / Applicant in this matter and that he has been informed that the Defendant was never served with the Writ of Summons or any document in respect of the matter. He stated that on searching the file he observed that Judgment in default of Appearance had been entered against the Defendant on 8th January, 2001 and that the Plaintiff had obtained leave to issue a writ of possession against the Defendant on 20th March 2003 which writ was renewed on 9th July 2004. He further deposed that the Defendant only knew about the matter when a Bailiff of the High Court accompanied

by Police personnel came to her compound on 17th August 2005 with the intention of executing the writ of possession. He further deposed that the piece of land in dispute is used as an access road leading to various properties in the area and that by obtaining judgment in the matter without the opportunity to defend will cause untold inconvenience to the defendant and the community in the area. He referred to the proposed defence and counterclaim and stated that the said defence disclosed triable issues. He therefore urged the court to allow the defendant to defend the action.

In reply to the application the Plaintiff who is acting in person referred to his affidavit in opposition. He stated that he has evidence in the form of an affidavit of service sworn by a bailiff of court that the Defendant was served with the writ of summons and the judgment in default of appearance respectively. He further stated that on 17th August 2005 when the court personnel went to execute the writ of possession, they were met with violence but they were nonetheless able to effect the execution. In his submission to the court, he submitted that the judgment in default, being a regular judgment can only be set aside on terms and on condition that the defendant has a good defence. He referred to the case of *Evans vs. Bartlam* [1937] AC. He stressed that the proposed defence is merely a sham and has no prospect of success. He also pointed out that he has title to the land in dispute whereas the Defendant has not shown any. Further he contended that mere possession without more does not constitute a fee simple owner.

The Plaintiff also referred to the delay of 4 years which the Defendant took to apply to defend the action. He stated that the period was unreasonable and unduly long. He cited the case of *Berthan Macaulay vs. Diamantopoles* [1982] 2 SLLR 8, in which the application was dismissed on the ground that the defendant delayed making his application for an unreasonable length of time after he had knowledge of the alleged irregularity.

He further stressed that, the plaintiff would suffer grave injustice if the piece of land is taken away from him as it forms an integral part of his land and further would adversely affect the plan of the house he was presently constructing on the land. He stated that the defendant on the other hand would not suffer any injustice as she has two alternative roads to the highway if this particular access road is closed. For all these reasons, the plaintiff / respondent urged the court to refuse the application.

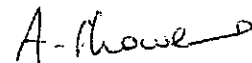
Having set out the submissions of both parties, I have now to exercise my discretion whether or not to grant the application. I must first of all consider whether the judgment entered is a regular one. It is regular in that it was entered in default of the defendant entering appearance. However

I must observe that the plaintiff's claim for recovery of possession for which judgment was entered was only one of many reliefs prayed for. In addition to the claim for recovery of possession, he also claimed declaration of title to the land in dispute, a declaration that the Defendant is not entitled to use the said access road and a perpetual injunction restraining her and her servants and privies from entering or using the said land as an access road as well as other reliefs. It is my view that where the defendant fails to enter appearance in this case, he ought to have applied the provision of Order 10 Rule 11 of the Rules of the High Court and proceeded to prove his case as if the defendant had appeared. In an action for declaration of title the plaintiff ought to prove his case by the strength of his title and not the weakness of the opponent's.

I have also perused the defence and counterclaim proposed to be filed by the defendant. It is my view that it discloses triable issues and that the matter ought to be heard on its merits. The defendant has explained the reason for her delay in applying to defend the action though the reason has been controverted. However be that as it may, it is my view that where the defendant has shown a defence on its merits justice demands that it should be adjudicated upon.

In the light of the above, I would grant the application. The judgment in default of Appearance dated the 8th January 2001 is hereby set aside and the defendant is granted leave to defend the action. The defendant is at liberty to file and serve her proposed defence within three (3) days from the date hereof. The plaintiff may file a reply within 7 days thereafter. The matter may be entered for trial thereafter.

The defendant will pay the costs thrown away assessed at Le750, 000



A. Showers J.

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