

C.C. 135/11

2011

K No. 16

IN THE HIGH COURT OF SIERRA LEONE  
LAND PROPERTY DIVISION

IN THE MATTER OF THE ESTATE OF CHIEF SIAKY BOCKARIE KONTEH II  
(Deceased Intestate)

BETWEEN ABU YAMAKORO KONTEH

(As Administrator and Trustee of the  
Estate of Chief Siaky Bockarie Konteh II)

(Deceased Intestate)

- PLAINTIFF

AND

MANTENNEH KONTEH

- DEFENDANT

COUNSEL:

J B JENKINS-JOHNSTON ESQ for the Plaintiff

ELVIS KARGBO ESQ for the Defendant

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE  
JUSTICE OF APPEAL

JUDGMENT DATED THE 9 DAY OF OCTOBER, 2012

1. By a writ of summons issued on 10 May, 2011 the Plaintiff sought the recovery of possession of that part of the property situate at 42 Pademba Road, Freetown occupied by the Defendant and her family, any further or other Order the Court may deem fit and just; and the Costs of the action. The Plaintiff avers that by a Trust Deed made by the late Chief Siaky Bockarie Konteh (hereafter, "deceased intestate") on the 21<sup>st</sup> day of September, 1989 and duly registered as No 215 at page 109 in volume 46 of the Record Books of Miscellaneous Instruments kept in the office of the Registrar-General, Freetown the deceased intestate appointed himself and the Plaintiff herein, Trustees, and declared certain trusts as recorded in that instrument. Clause 1(c) of the Trust reads as follows: "*The Settlor hereby declares all his property REAL that is to say: (a).....(b)....(c) No 42 Pademba Road, Freetown, in the Western Area of Sierra Leone to be a settlement upon the following Trusts (i) for the benefit of the Settlor for and during his lifetime; (ii) Upon and/or after the death of the said Settlor for the benefit of the children of the said Settlor, namely: (a) Yamakoro Abu Konteh.....(h) Numtene Konteh.....in*

*such manner, occasion and or proportion as is in the absolute discretion of the said Yamakoro Abu Konteh, the other named Trustee, shall seem just: provided that no portion, any or all of the said property shall be sold...."* *Numtene, I believe has been misspelt in the writ.*

2. The deceased intestate died on 5 November, 1989 in Freetown, and on 24 October, 2008 Letters of Administration in respect of his estate were granted to the Plaintiff as the eldest lawful son, to administer the estate of the deceased intestate. It appears the Plaintiff brought proceedings against the Defendant in 2008, and SHOWERS, JA, on 11 June, 2009, granted him a perpetual injunction restraining the Defendant from intermeddling with the estate of the deceased intestate, in particular the property at 42 Pademba Road. By various letters written by the Plaintiff's Solicitors on 30 April, 2009, 19 October, 2009 and 21 February, 2011 respectively, the Plaintiff purported to distribute the estate of the deceased intestate. It is this distribution which the Defendant disagrees with. The Plaintiff avers that she has refused to give up possession of that part of 42 Pademba Road occupied by her, and has been constantly getting into arguments with the senior widow Haja Sundu Yamakoro Konteh. This is why he has brought action against her.
3. On 18 May, 2011 Mr Kargbo entered appearance on behalf of the Defendant, and on 7 June, 2011, he filed a statement of defence on her behalf. It makes several allegations, and raises several issues. The Defendant contends that SHOWERS, JA did not Order her to vacate the property at No. 42; that the deceased intestate was sick and motionless for about 3 months prior to his death and could not have executed the trust deed; that the Plaintiff was not entitled to the Grant he had obtained; that Defendant's mother was the proper person to administer the deceased intestate's estate; that the Plaintiff had no right to select the No. 42 property for himself and his mother, and to allocate a vacant plot of land at 47 Kissy Bye Pass Road to Defendant's mother; that there are well over 15 other beneficiaries who should have been informed, or should have been parties to the action herein; and, that she received the notice to quit but had instructed her Solicitor to query the validity of the notice.
4. On 9 June, 2011 the Plaintiff filed a Judge's Summons dated 8 June, 2011 asking for final judgment to be entered in his favour in terms of the



reliefs claimed in the writ of summons, pursuant to Order 16(1) of the High Court Rules 2007 - HCR, 2007. The Summons is supported by the affidavit of the Plaintiff deposed and sworn to the same day. Several documents are exhibited to the affidavit, including, a copy of the writ of summons herein, correspondence between Solicitors for both parties, and Orders of Court made by SHOWERS, JA.

5. The Defendant has filed an affidavit in opposition deposed and sworn to by Mr Kargbo on 4 July, 2011. To that affidavit is exhibited a copy of the statement of defence filed on behalf of the Defendant on 7 June, 2011. Mr Kargbo is here saying that the Defendant has a good defence on the merits, to the Plaintiff's claim.
6. Order 16 Rule 1(1) HCR, 2007 provides that: "*Where in an action to which this rule applies a defendant has been served with a statement of claim and has entered appearance, the plaintiff may, on notice apply to the court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of the claim except as to the amount of any damages claimed.*" Rule 3(1) states: "*Unless on the hearing of an application under rule 1, either the court dismisses the application or the defendant satisfies the court with respect to the claim or the part of a claim, to which the application relates, that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*" Rule 4(1) states that: "*A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.*"
7. On the facts of this case, can I truthfully say that there is "*no issue or question in dispute which ought to be tried?*" I do not think I can. There are too many issues to be litigated for there to be summary judgment at this stage. The grant of Administration is really irrelevant to the action in my view, as the Declaration of Trust was an inter vivos transaction which was and remains valid until set aside by a Court of competent jurisdiction. The properties declared subject to a trust could not therefore, in my respectful opinion have fallen into intestacy on the Settlor's death. The duty of the surviving Trustee at the death of the

Settlor, was to carry out the duties engrafted upon the Trust. He has to bear in mind that as Trustee, he should act in the interest of all the beneficiaries.

8. The Plaintiff's action throws up several legal issues. What was given to the Plaintiff: was it a trust or a mere power; if a power, was it a bare power or a power with some fiduciary obligation attached? Was it a power of appointment, or, was it a discretionary trust? Has he committed a 'fraud on a power' by apportioning the properties in the manner stated in his Solicitors' letters? These are all issues which will have to be decided at, and in a full-scale trial, not in a summary manner as requested by the Plaintiff. The summary judgment procedure is therefore inappropriate in the circumstances. If, as deposed by the Plaintiff in his affidavit of 8 June, 2011 that "*....it is very necessary for the two families to be separated because of the several incidents and frictions between the two some of which have resulted in breaches of the peace and reports to the police...*" he knows where his remedy lies. It does not lie in an Order 16 Application.
9. In the premises, I make the following Orders:
  - (1) The Plaintiff's Application for summary judgment is dismissed with Costs to the Defendant, such Costs to be taxed if not agreed.
  - (2) The Defendant is given unconditional leave to defend the action, and the statement of defence filed on his behalf on 7 June, 2011 shall stand for this purpose.
  - (3) Pursuant to Order 16 Rule 6 of the High Court Rules, 2007, I give the following Directions for the future conduct of the action:
    - i. That within 7 days of the date of this Order, each party serves on the other, the following:
      - (a) List of all documents to be used or tendered at the trial.
      - (b) Copies of all such documents which either party shall indicate it requires for the purposes of the trial
      - (c) List of witnesses
      - (d) Witness statements of all such witnesses
      - (e) Admissions of fact, if any
      - (f) List of Issues in Dispute
      - (g) Nature of evidence to be called.

- ii. All documents in respect of which inspection is required by either party, shall be so inspected within the said 7 day period.
- iii. That within 14 days of the date of this Order, the Plaintiff shall set down the action for trial, and shall state the estimated length of the trial.
- iv. Within 7 days from the date the action is set down for trial, the Defendant shall indicate and identify to the Plaintiff those documents central to his case which he wishes to be included in the Court Bundle.
- v. At least 7 clear days before the date fixed for trial, the Plaintiff shall Lodge two Bundles consisting of one copy each of the documents listed in order 40 Sub-Rule 9(2) paragraphs (a) to (c) inclusive of the High Court Rules, 2007.
- vi. This file shall be put before a Judge on the 5th day of November, 2012 for the purpose of ensuring compliance with these Directions, and for the purpose of fixing a date of trial.
- vii. Each party is at Liberty to Apply to the Court for an extension of time within which to comply with any of the Directions given above.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE