

C.C. 2/11

2011

P No. 3

IN THE HIGH COURT OF SIERRA LEONE
PROBATE JURISDICTION

BETWEEN:

MOSES BOB PESSIMA

- PLAINTIFF

(Suing by his Attorney GEORGE PESSIMA)

AND

PASTOR JOSEPH KHANDA

- 1ST DEFENDANT

ABRAHAM OJU SHYLLON

- 2ND DEFENDANT

COUNSEL:

E N B NGAKUI ESQ for Plaintiff

I KANU ESQ for Defendants

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

JUDGMENT DELIVERED THE 30 DAY OF MAY, 2012.

INTRODUCTION

1. By Notice of Motion dated 17 March, 2011 the Plaintiff applied to this Court for several Orders: First, that this Court grants a stay of proceedings pending the hearing and determination of the Application herein, and of the action herein, in the matter between the 1st Defendant and Plaintiff's Attorney, George Pessima, and between 1st Plaintiff and one James Squire Junior, who is not a party in the action herein; second, that this Court grants an Injunction Restraining the Defendants from interfering with the occupation and management of land and premises situate at and known as 9B Willoughby Lane, Brookfields, Freetown, pending the hearing and determination of the Application herein, and of the action herein; third, any other Order this Court may deem fit; and for the Costs of this Application to be Costs in the Cause.

PLAINTIFF'S 1ST AFFIDAVIT

2. The Application is supported by the affidavit of George Pessima, the Plaintiff's Attorney, deposed and sworn to on 17 March, 2011. Mr Pessima

WLU deposes that he was given a Power of Attorney, exhibit GP1, dated 5 November, 2010, by the Plaintiff. This Deed empowered him to bring action against the Defendants. The writ of summons issued against the Defendants is exhibit GP2. In this writ, the Plaintiff prays that the Letters of Administration dated 7 March, 2007 granted to the late Mrs Grace Sudie Mattia be declared to have contravened Section 43(1) of the Administration of Estates Act, Chapter 45 of the Laws of Sierra Leone, 1960; that the grant was fraudulent as it was made on the basis of a false marriage certificate purporting to show that Grace Mattia was married to Robert Nathaniel Mattia; that the Grant be cancelled; that a Vesting Assent executed by the said Grace Mattia in her favour be cancelled; that the Defendants do give an account of all rents received in respect of the property at Willoughby Lane; and that they be restrained from intermeddling with the property. These are all weighty matters which can only be determined in a full-scale trial.

3. The Defendants entered appearance to the writ of summons, and gave notice of the same as shown in exhibits 3A & 3B. The Defendants also filed a Defence, exhibit 4. In brief, the Defendants aver that the property at Willoughby Lane was bought by both Mr and Mrs Mattia; that it was never family property; and that Plaintiff's Attorney had signed a Deed of Family Arrangement dated 24 October, 2008 which was duly registered. In his Reply to this Defence, the Plaintiff merely joined issue with the Defendants.
4. The Plaintiff's Attorney deposed further that the property at Willoughby Lane was the property of his late grandfather, Robert Mattia. That the Defendants have instituted ejectment proceedings in the Magistrate's Court against himself, Joseph Squire, and other persons. The ejectment summonses are exhibited as GP6A&B. These Summonses were issued on 28 February, 2011, 14 days after the Defendants had filed their joint Defence on 14 February, 2011, and 28 days after the issue of the writ of summons. In other words, the Defendants were well aware that proceedings in a superior Court had been instituted, but chose to invoke the summary process available in an inferior Court. The Plaintiff therefore asks that the proceedings in the Lower Court be stayed until this Court has been able to determine the issues of ownership which are adumbrated in the writ of summons.

DEFENDANTS' AFFIDAVITS IN OPPOSITION

5. The Defendants oppose the granting of a stay of the proceedings in the Court below, and they have filed an affidavit in opposition deposed and sworn to by Mr Kanu on 24 March, 2011. In his affidavit, Mr Kanu deposes that the Defendants are Executors and Trustees of the Will of Grace Mattia dated 14 March, 2007, exhibit IK1; that the Plaintiff is a signatory to a Deed of Family Arrangement dated 24 October, 2008 - exhibit IK2. Though in this Deed, the Plaintiff Moses Pessima is said to be a party in the opening section, he is not actually a signatory to the Deed. In paragraph 6 it is witnessed that: *"It is also agreed in a family meeting that MR GEORGE PESSIMA should represent MR JACOB PESSIMA, MOSES PESSIMA and JOSEPH PESSIMA as they are out of the Sierra Leone jurisdiction including executing this Deed of Family Arrangement."*
6. Mr Kanu deposes further that the agreement dated 28 July, 1998 was never discussed between the Defendants and Mrs Mattia during her lifetime; and that the Plaintiff's Application was filed merely to forestall the proceedings in the Court below, and to prevent the Defendants from carrying out the instructions given by Grace Mattia in her will.
7. In a second affidavit in opposition deposed and sworn to again by Mr Kanu on 29 March, 2011 he exhibits as "A", a Deed of Conveyance dated 19 October, 1976 and duly registered, and made between Pessima Johnson aka Pessima Tikonko and Robert Mattia. It evidences the sale of land at Willoughby Lane, Brookfields to Robert Mattia. Mr Kanu also poses a rhetorical question in his affidavit which I believe, he is the best person to answer.

PLAINTIFF'S AFFIDAVIT IN REPLY

8. The Plaintiff's Attorney has also filed an affidavit in Reply to both affidavits in opposition, deposed and sworn to by him on 1 April, 2011. Mr Pessima denies that he was a signatory to the Deed of Family Arrangement. He deposes also that the agreement he referred to in the writ of summons was dated 28 July, 1989 and not 28 July, 1998 as alleged by Mr Kanu. The agreement is exhibited as GP1. The numbering is wrong as when a person deposes to two consecutive affidavits in the same Application, the exhibits should be numbered serially or sequentially;

numbers should not be repeated in the second affidavit. I have warned Counsel about this, but they seem not to heed the warning. I shall soon start penalising Counsel, personally, for this error. As to the agreement itself, part of it - i.e. part of the second paragraph, is indecipherable. Lastly, the deponent deposes that the Application herein is made in the interests of justice.

PLAINTIFF'S UNDERTAKING

9. Mr Pessima also on 28 March, 2011 filed an Undertaking as to Damages in the event that an Injunction is granted in his favour.

FINDINGS

STAY OF PROCEEDINGS

10. As to that part of the Application which prays a stay of the proceedings, I am of the view that it ought to be granted. The subject matter is the same in the proceedings in this Court, ~~and~~ in the Court below, i.e., the property at Willoughby Lane. The principal issue in dispute is as to who is, or are the real legal owner or owners of, and/or beneficiary or beneficiaries entitled to a share or to shares in the property. The proceedings in the Court below have been brought under The Summary Ejectment Act, Chapter 49 of the Laws of Sierra Leone, 1960. Section 11 thereof provides that: "*Nothing in this Act contained shall be deemed to abridge or affect the jurisdiction vested, or hereafter to be vested, in the Courts of Sierra Leone in taking cognisance of, and adjudicating upon, questions of title and matters relating to lands, tenements and hereditaments.....*" The jurisdiction to declare ownership of, or entitlement to property is vested exclusively in the High Court by Section 132(1) of the Constitution of Sierra Leone, 1991 and by Section 18 of the Courts' Act, 1965. This is so, because the jurisdiction of a Magistrate's Court in civil matters, is circumscribed by the provisions of Section 7(1)&(2) of, and the Third Schedule to the Courts' Act, 1965. Whilst the jurisdiction of the High Court is unlimited, that of a Magistrate's Court is limited by these provisions. The Court below cannot therefore determine the principal issue in dispute.

INJUNCTION

11. As to whether or not I should grant the Injunction in the terms prayed for by the Plaintiff, I have to act in accordance with the guiding principles which I set out in the case of C.C.305/08 OSMAN KAMARA (alias OTK) v THE FORMER EXECUTIVE OF THE MOTOR DRIVERS AND GENERAL TRANSPORT WORKERS UNION Judgment delivered 7 October, 2008. There, I said: "*The principles enunciated in the AMERICAN CYANAMID case are still applicable: the Plaintiff must establish that he has a good arguable claim to the right he seeks to protect; the Court must not attempt to decide this claim on the affidavits; it is enough that the Plaintiff shows that there is a serious issue to be tried; if the Plaintiff satisfies those tests, the grant or refusal of an Injunction is a matter for the exercise of the Court's discretion on the balance of convenience. The White Book tells us also that "where neither side is interested in monetary compensation and the decision on the Application for an Injunction will be the equivalent of a final Judgment.....the Court should not grant an Interlocutory Injunction...merely because the Plaintiff is able to show a good arguable case, and the balance of convenience lies in granting an Injunction; instead, the Court should assess the relative strength of the parties' cases before deciding whether the Injunction should be granted..... In deciding where the balance of convenience lies, the principles the Court should bear in mind are: first, is whether damages would be a sufficient remedy; if so an Injunction ought not to be granted. Damages may also not be sufficient if the wrong is a) irreparable, or b) outside the scope of pecuniary compensation, or c) if damages would be difficult to assess. It will be, generally, material to consider whether more harm will be done by granting or by refusing an Injunction. I must also consider whether, the granting of an Injunction is the only way the Plaintiff could seek to enforce the requirements of the provisions in the Union's Constitution, relating to the holding of elections. The Plaintiff must also give an Undertaking as to Damages."*
12. The Plaintiff has clearly established that he has a good arguable claim to the right he seeks to protect, and that there is a serious issue to be tried. I should then try to decide where the balance of convenience lies.

The Plaintiff is not, by the nature of his claim, really interested in monetary compensation - he is fighting for his entitlement to the property. My decision on whether or not to grant an Injunction will not finally decide the rights of the parties. I am satisfied damages will not be an adequate remedy were the Injunction to be refused, and irreparable damage were to be done to the Plaintiff, by for instance, the Defendants disposing of the property by sale. I am satisfied also, that the grant of an Injunction is the only way the Plaintiff can protect his interests until the final determination of the action herein. I am of the view therefore, that an Injunction ought to be granted in the terms I shall go on to state. Further, because of the time which has elapsed since I adjourned for Judgment, I shall at once also give Directions for the future conduct of the action without the necessity of either party taking out a Summons for Directions. I note also that the Plaintiff has already filed a Reply to the Defendants' Defence.

CONCLUSION - ORDERS

13. I shall therefore make the following Orders:

- i. This Honourable Court Orders a stay of proceedings in the matters pending in Magistrate's Court No.4 between Rev Joseph Khanda and George Pessima, and between Rev Joseph Khanda and James Squire junior pending the hearing and determination of the action herein.
- ii. This Honourable Court grants an Injunction Restraining the Defendants and/or their servants and agents, or howsoever otherwise from selling or leasing or by otherwise disposing of the property situate at and known as 9B Willoughby Lane No 2, Brookfields, Freetown; and from interfering with the present occupation of the property by the Plaintiff or the Plaintiff's Attorney herein, or by the Plaintiff or his Attorney's Licencees, until the determination of the action herein. For the avoidance of doubt, the sale of the property by either Defendant, or by both Defendants, is expressly forbidden.
- iii. The Plaintiff or his Attorney shall file a fresh Undertaking as to Damages which shall remain in force until the final determination of the action herein.
- iv. Costs in the Cause.

14. I shall also give the following directions for the future conduct of the action herein:

- i. That within 7 days of the date of this Order, the Plaintiff and the Defendant shall serve on the other the following:
 - (a) List of all documents in the possession, custody or power of each party.
 - (b) List of witnesses
 - (c) Witness statements of all such witnesses
 - (d) Admissions of fact, if any
 - (e) List of Issues in Dispute
 - (f) Nature of evidence to be called.
- ii. All documents in respect of which inspection is required by either side, shall be so inspected within 5 days of the service of such lists, at such time and at such place as shall be indicated by the party of whom inspection is required.
- 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 4 days from the date the action is set down for trial, the Defendant shall indicate and identify to the Plaintiff those documents central to its case which it wishes to be included in the Court Bundle.
- v. At least 4 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 18th day of June, 2012 for the purpose of ensuring compliance with these Directions, and for the purpose of fixing a date of trial.
- vii. There shall be Liberty to apply to this Court by way of Summons for further Directions if needs be.
- viii. Costs in the Cause.

Mr Justice N C Browne-Marke

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE