

C.C. 246/09

2009

K No. 35

IN THE HIGH COURT OF SIERRA LEONE
LAND AND PROPERTY DIVISION

BETWEEN:

MARY KALLON

PLAINTIFF

(ADMINISTRATRIX OF THE ESTATE
OF POSSESH KAMARA DECEASED INTESTATE)

AND

MOHAMED MUSLIM KOROMA

FATMATA KAMARA

DEFENDANTS

COUNSEL:

E PABS-GARNON ESQ for the Plaintiff

J K LANSANA ESQ for the Defendants

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

JUDGMENT DELIVERED THE 21 DAY OF FEBRUARY, 2012.

1. This is an Application brought by the Defendants, by way of Notice of Motion dated 25 August, 2010. The Defendants have applied for the following Orders: That Leave be granted to them to set aside the Final and Interlocutory Judgment in default of Appearance entered in favour of the Plaintiff on 1 June, 2010 in respect of land and houses and hereditaments situate at 1 Sunday Street, Calaba Town, Freetown; that they be allowed to file a defence out of time as they have a good defence to the Plaintiff's claim; and that the Costs of the Application be Costs in the ^{course} ~~course~~. *cmbe*
2. The Application is supported by the affidavit of the 2nd Defendant deposed and sworn to on 25 August, 2010. Exhibited to that affidavit are several documents. "A" is a copy of a receipt purportedly dated 24 December, 2008. I say purportedly, because, as I shall later show, there is strong reason to believe that that copy was not a genuine copy of the receipt signed by the Plaintiff on the night Christmas Eve, 2008. "B" is a copy of another purported receipt dated 5 March, 2009. "C" is a copy of an advance copy of a survey plan dated 18 February, 2009. "D" is a copy of a conveyance dated 6 May, 2006 evidencing the sale of the property situate off Freetown Waterloo Road, Pamaronkoh, Calaba Town to the

Plaintiff's predecessor-in-title, the late Posse Kabia. "E" is a copy of the writ of summons issued in the action herein by the Plaintiff on 6 October, 2009. "F" is a copy of the Order for substituted service made by TAYLOR, J on 17 March, 2010. In that Order, TAYLOR, J granted leave to the Plaintiff to serve the writ of summons on Mr J K Lansana, Defendants' Solicitor and Counsel, at his chambers at 12 Brook Street, Freetown. "G" is a copy of the Judgment in Default of Appearance entered against the Defendants on 1 June, 2010. "H" is a copy of a letter dated 28 June, 2010 addressed by Plaintiff's Solicitors to both Defendants and to all persons in occupation of the property at 1 Sunday Street, Calaba Town. "I" and "J" are copies of the Memorandum and Notice of Appearance entered on behalf of the Defendants. "K" is a copy of the proposed Defence and Counter Claim of the Defendants. Mr Lansana, during the course of argument, relied on the entire contents of this affidavit.

3. I shall now deal with these contents. She deposed that sometime in November, 2008 the 1st Defendant, her brother who resides in Columbus, Ohio, United States of America, instructed her to negotiate the purchase of the property at 1 Sunday Street, Calaba Town. On or about Wednesday 24 December, 2008 at Mr Lansana's chambers at 12 Upper Brook Street, she, on behalf of 1st Defendant, paid to Plaintiff the sum of Le20million with an outstanding balance of Le30million to be paid, as part payment of the purchase price for the property. She does not state when the balance was to be paid, and this I find to be rather unusual. It is most unusual for a vendor to tie him or herself up indefinitely, without there being any cut-off date for payment. I doubt whether any vendor in his or her right mind will say to a prospective buyer, 'pay whenever you like; I shall wait indefinitely for you to pay me'. But this is what 2nd Defendant wants this Court to believe really transpired between herself and Plaintiff in the presence of Mr Lansana. She referred to the copy of the purported receipt exhibited as "A", as proof of this payment. I shall now turn to this all important copy.
4. That it is not really a true copy of a document in its original state is obvious on the first page. It is hand-written and headed "RECEIPT", and reads: " I, MRS MARY KALLON of No 6 Shell Lane, Newsite, Off Shell Company, Kissy, Freetown cell no. 076 534 142 intended Administratrix

and sole beneficiary of the estate of Madam Possek Kabia (deceased) who died in Freetown on the 26th day of July, 2000 intestate and late of 163 Kissy Bye Pass Road, Kissy, Freetown on my own behalf and on behalf of my sister Madam Fatmata Sesay of London, UK, do hereby receive and confirm payment to me by - Mr Mohamed Muslim Koroma of No 32 Dougan Street, Freetown the sum of Le20,000,000 (twenty million Leones) being 2nd payment for all that piece or parcel of land, unfinished storey building, cement block adjoining and one makeshift C I Sheet structure, tenements and hereditaments with all the appurtenances thereto belonging situate at No 1 Sunday Street, Pamaronkoh, Calaba Town (back of Foamex) Freetown Western Area of Sierra Leone." At the bottom of the page there are the additional words: "Balance Le30,000,000 (thirty million Leones)". There is the distinct possibility that these words, which have no direct bearing on the words immediately preceding, may have been added on by subterfuge. It is quite telling that Plaintiff's signature does not appear anywhere on this document. On the third page the heading is "witnesses". They are said to be Musa Kallon and Ayo Perry. Their purported signatures appear on the same page. At the bottom of the page are the words "Dated Wednesday the 24th day of December, 2008."

5. The first strange thing about this copy, is that the signature of the Plaintiff does not appear there. Her name appears at the top of the first page, apparently in the handwriting of Mr Lansana. Second, the signatures of the witnesses appear on a separate page, the third page, which indicates that it could have been added on after the first two pages had been prepared. Then curiously, after these signatures, appear the words "Dated Wednesday the 24th day of December, 2008." But most importantly for the purposes of the bona fides of the 2nd Defendant, and of Mr Lansana, it states that this is a "2nd payment". She has herself deposed that the first payment was made on 24th December, 2008. For the receipt which, it appears, was prepared by Mr Lansana, to refer to the payment made, as a second payment, throws considerable doubt on the authenticity of the document without even referring to the Plaintiff's affidavit in opposition. Clearly, this was the first payment made, and not the second. Could it have been a Freudian slip, caused perhaps, by the

reason advanced by the Plaintiff, that it was created as an afterthought? This remains to be seen.

6. In paragraph 3, she deposed that "on or about the 5th day of March, 2009 the Plaintiff received a further deposit from me also as agent for the 1st Defendant herein.....in the sum of Le20,000,000..... of which she acknowledged and issued receipt....a copy of the said (is) marked "B". Let us now turn our attention to exhibit "B". It is handwritten. It states: "*I MRS MARY KALLON of No 16 Shell Lane.....do hereby receive and confirm payment to me by Mr Mohamed Muslim Koroma.....the sum of Le20,000,000..... being part payment for all that piece or parcel of land.....at 1 Sunday Street.....*" Midway to bottom of the page there appears these words and figures: Balance - Le10,000,000 (Ten Million Leones). At the bottom signed: a signature appears, and then the name: Mrs Mary Kallon. Curiously again, on the third page, Mrs Kallon's name and signature appear at the top. Further down that page, the names and signatures of Messrs Kanu and Perry appear as well. The date at the bottom is given as Thursday 5/3/09. This receipt seems to be more in line with the transaction carried out on 24 December, 2008 than purportedly on 5 March, 2009. This is why it refers to a part payment, and exhibit "A" refers to 2nd payment. In trying to outwit the Plaintiff and the Court, the 2nd Defendant has only succeeded in outwitting herself. Whatever the interpretation Mr Lansana may wish to give to this document part payment in the sum of Le20million out of an agreed price, according to him, of Le50million, could not leave an outstanding balance of Le10million. It would leave an outstanding balance of Le30million.
7. Going further, the 2nd Defendant deposed that after the second payment in March, 2009 the Plaintiff took herself and 1st Defendant to the property, and introduced them to the neighbours, and put 1st Defendant into possession. 1st Defendant hired a surveyor, and an advance copy of a survey plan was prepared by the surveyor for him. It is dated 18 February, 2009 and is exhibited as "C". 2nd Defendant wants the Court to believe, that before even making the second payment of Le20million, 1st Defendant had got a plan made in his name. She went on to say that in March, 2009 Plaintiff visited her at her house at Dougan Street, Freetown and pleaded with her to pay the balance of Le10,000,000. 2nd Defendant says "*I refused as I insisted that the balance can only be paid*

at the time of execution of the document of transfer i.e. the conveyance". My thoughts on this, are that the conveyance is usually signed by the vendor when the purchase price has been paid in full. If, as 2nd Defendant has deposed, only the sum of Le10million was outstanding, why did she not pay the Plaintiff this amount when Plaintiff called upon her. An advance copy of the survey plan had already been prepared in the name of the 1st Defendant the month before. 2nd Defendant deposed further that Plaintiff threatened to go to Mr Lansana to retrieve her original conveyance, and that she told Plaintiff Mr Lansana would never give it back to her. In this respect, she was quite accurate. Both lawyer and client had decided to hold on to the Plaintiff's title deed without indicating to her when they would pay her for her property. She exhibited a copy of the conveyance as "D". And as she deposed it appears the original deed is still with Mr Lansana.

8. The reason for the application is to be found in her paragraph 8. There, she deposes as follows: ".....Since mid March,2009 my younger brother the 1st Defendant herein had returned to the United States; I was too away to a village (sic) outside Kabala on a business trip and only returned to Freetown recently when I came to learn that proceedings have been commenced against the 1st Defendant and myself by the Plaintiff herein. I can now see a true copy of the said writ of summons dated 6th October,2009.....and marked "E". Without realising it, 2nd Defendant had admitted in her paragraph 6, that in March,2009 she and/or her brother were indebted to Plaintiff, according to her, in the sum of Le10million. She then left for a village outside Kabala, and did not return to Freetown until, to use her own word, 'recently', that is over a year later in August,2010 - she doesn't state the exact date of her return; her brother had already commissioned a survey plan in his name. The vendor had not been fully paid, but she, the 2nd Defendant felt she had an inalienable right to Plaintiff's property. She knew nothing about all the documents and Orders which had been filed in this case. She had not asked whether Plaintiff wanted the balance of her money. This is the woman who has come to this Court, asking it to exercise its discretion in her favour by setting aside the Judgment in Default obtained by the Plaintiff against her. When one seeks to invoke the equitable jurisdiction of this Court, one must also do and practise equity.

9. In her paragraph 9, 2nd Defendant asks that this Court set aside the default judgment *ex debito justitiae*. Obviously, she does not know what this means. Her proposed defence is exhibited as "K".
10. I have examined it carefully, but I do not think there is anything in it which should warrant or convince this Court to hold that it constitutes a triable defence. For this Court to do so, it would have to jettison all the faults and untruths in the documents exhibited by the 2nd Defendant which I have detected and laid bare above. Even if I were to accept that the purchase price was indeed Le50million as she claims and contends, she has not explained why she has not paid it in full to date. She has not stated, for instance, that it was tendered but refused by the Plaintiff. So, the Defendants are not entitled '*ex debito justitiae* to fee simple ownership of the said property' as averred in paragraph 11 of the proposed defence.
11. The Plaintiff opposed the Application, and filed two affidavits, the first one, deposed to by one of her Solicitors, and Counsel in this matter, Mr Pabs-Garnon, on 2 September, 2010; and the other, by herself, also on 2 September, 2010. Subsequent to the closure of arguments, the Plaintiff filed two more affidavits deposed and sworn to by Mr Ayo Perry and Mr David Kanu on 4 October, 2010. Both of them denied signing a receipt, a copy of which was exhibited to the 2nd Defendant's affidavit as "B". Rather, both of them signed a receipt which stated the balance outstanding to be Le20million, and not Le10 million. As opportunity was not given to Defendant's Counsel to counter the claims made by these two gentlemen in their respective affidavits, they shall not form part of the *raison d'être* for the decision I shall arrive at the end of this judgment.
12. Mr Pabs-Garnon has with admirable clarity, set out the train of events leading to the action herein. His firm was consulted by the Plaintiff on 15 August, 2009. On 17 August, 2009, his firm sent a letter to Mr Lansana, explaining the Plaintiff's position and the events that had happened involving Plaintiff and both Defendants. That letter is "EPG1". The evidence of service of the letter is to be found in "EPG2", which is a photocopy of an entry in the way book. In that letter, it is alleged that the Defendants forcibly took possession of the property at 1 Sunday Street, and have made free use of building materials belonging to the Plaintiff. Due to the persistent failure of the Defendants to pay the

outstanding balance of the purchase price, and the unscrupulous attempt to insist on a lower figure, Plaintiff's Solicitors notified Mr Lansana that Plaintiff was prepared to return the total sum of Le40million she had received from 2nd Defendant. There was no response from Mr Lansana. A reminder dated 2 September, 2009 was sent to him - exhibit "EPG3". The evidence of service, exhibit "EPG4" is incorrect, as I pointed out to Mr Pabs-Garnon during the course of argument. With no response from Mr Lansana, another letter dated 28 September, 2009 exhibit "EPG5" was again addressed to him, forwarding a cheque in the sum of Le40million. He was asked to acknowledge receipt of the cheque by signing on a copy of the letter. He did not do so. In the course of his Reply to Mr Pabs-Garnon's arguments, Mr Lansana said he did not receive the cheque. I do not believe him. Exhibit "EPG6" shows that on 28 September, 2009 somebody signing as 'Sesay' in Mr Lansana's chambers acknowledged receipt of the cheque. Mr Lansana, in his Reply said he had a secretary called Jebes Sesay. Mr Pabs-Garnon deposed that he was informed and verily believed that the cheque was taken in to Mr Lansana, but he ordered his secretary to return it.. A copy of the cheque is exhibited as "EPG7". Criminal proceedings were instituted against the Defendants in the Magistrate's Court, and Mr Lansana defended them. The writ herein was issued, and Mr Pabs-Garnon deposes that he brought it to the attention of Mr Lansana. Notwithstanding this encounter with Mr Lansana, he was forced to seek an Order for substituted service of the writ on Mr Lansana. The Order is not exhibited, but exhibit "EPG9" is a copy of an entry in a way book evidencing service of the Order on Mr Lansana at his chambers at 12 Brook Street. It was received by someone who signed 'Sesay'. Mr Lansana did nothing about it. He did not enter appearance until Judgment in default had been obtained against his clients. I roundly castigated him for his inaction during the course of argument. His lame excuse was that his client was in the Provinces. This very client, according to their calculations was still indebted, to the knowledge of Mr Lansana, to the Plaintiff in the sum of Le10million. Yet stil, Mr Lansana made no attempt to track 2nd Defendant down, or to contact 1st Defendant in the USA where 2nd Defendant said he had gone in March, 2009. Mr Pabs-Garnon wrongly deposes in paragraph 15 of his affidavit that Mr Lansana was served with this Order on 30 April, 2010. The entry in the way book, a

copy of which is exhibited as "EPG9" shows that it was actually signed for on 3 May, 2010. With matters at a standstill, Plaintiff's Solicitors paid into Court the sum of Le40million as evidenced by the letter dated 7 June, 2010 addressed by them to the Master and Registrar, and the Accountant-General's receipt (payment into account) No. 39831 dated 7 June, 2010, exhibited as "EPG10&11" respectively.

13. I shall now turn my attention to the affidavit of the Plaintiff. She deposed that she was never issued with copies of the receipts she signed in Mr Lansana's chambers. The receipts were handwritten by Mr Lansana himself in candlelight between the hours of 9pm and 10pm. The receipt allegedly made in March, was in fact, according to her, made in February. Neither receipt had a date. When she refused to accept the receipt exhibited as "B", Mr Lansana promised to issue a fresh one, and indeed do so, showing the balance to be Le20million. She signed this particular receipt. She requested a copy, but Mr Lansana has not given her one. This third receipt was signed by both Messrs Kanu and Perry. Mr Lansana promised to cancel "B". Evidently, he did not. Plaintiff denied visiting 2nd Defendant as alleged by 2nd Defendant. She agreed she did go to the premises in question whilst Mr Lansana and some other people - she does not specify - were there; but she did not hand over possession of the same to them or to him. She demanded payment of the balance due her, but the Defendants refused to budge; instead, they invaded the premises, and she had to report the matter to the Police.

14. In his reply to all that was said, Mr Lansana said that the Plaintiff never demanded Le60million for the property; that he was never presented with a cheque; that the signature in the way book, copies of which were exhibited, were not those of his clerk, nor his secretary; he was never aware payment into Court had been made; Plaintiff did not ask him to prepare another receipt. And this: *"the signatures of Plaintiff were jumbled. That is why they appear on the 2nd and 3rd pages. Originals are not available."* Even if I were to accept and believe what Mr Lansana said in Court, the burning question will still remain, why the inaction between March, 2009 and August, 2010 when he entered appearance. He knew very well there was still an amount outstanding by way of payment of the full purchase price for the property be it Le10million or Le20million. One would have thought that in order to convince the Court that the 2nd

Defendant truly believed that only Le10million was still due and owing the Plaintiff, 2nd Defendant would have brought the money into Court to show her bona fides. Instead, she has been posturing with the sole intent of manipulating the Court and its processes in order to frustrate the Plaintiff. Because while Judgment has been pending, the Plaintiff has not been able to do anything with the property. The money she received from the Defendants, she has paid into Court. So, she is not only out of pocket, but also out of property. If I were to set aside the Judgment in Default, I would be perpetuating this ugly and unsatisfactory state of affairs.

15. There is no serious contention that the Judgment is irregular. It is a regular Judgment. I cannot therefore set it aside *ex debito justitiae*. As to setting aside regular judgments, the principles are well known. The Applicant must file an affidavit stating facts showing a defence on the merits. The Defendants must show that they have a meritorious defence. The major consideration, to paraphrase the SUPREME COURT PRACTICE, 1999 para 13/9/7 is whether the Defendants have disclosed a defence on the merits, and this transcends any reasons given by them for the delay in making the application even if the explanation given by them is false. The fact that they have told lies in seeking to explain the delay, however, may affect their credibility, and therefore be relevant to the credibility of their defence and the way in which the Court should exercise its discretion.

16. On the facts before me, the Defendants have not shown that they have a Defence to the Plaintiff's case which has a real prospect of success; nor, that it carries some degree of conviction. It is my considered opinion, and I so adjudge, that Mr Lansana, and to some extent, the 2nd Defendant, deliberately ignored these proceedings: Mr Lansana, by ignoring the various documents sent to him, including the writ of summons; and the 2nd Defendant, by deliberately doing nothing about the outstanding balance, according to her calculations, due the Plaintiff. No reasonable person would say to himself that even though he owes the vendor of property an outstanding balance, he can very well go to the provinces and remain out of touch with the vendor for over one year, and still expect the vendor to wait patiently for him to complete payment. The absence of the 1st Defendant abroad at the commencement of proceedings, does not really

confer a benefit on him, as his sister, the 2nd Defendant, has, by her own account, been acting in his stead.

17. The most the Defendants are entitled to, is to demand payment of the sum of Le40million paid into the Judicial Sub-Treasury by the Plaintiff, and no more. I cannot too strongly express my disapprobation of the conduct of both Mr Lansana and the 2nd Defendant.
18. In the result, the Defendants' Application dated 25 August, 2010, is dismissed with Costs, such Costs to be taxed if not agreed.



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