C.C 162/10 2010 J No. 9

IN THE HIGH COURT OF SIERRA LEONE
LAND AND PROPERTY DIVISION
BETWEEN:
MRS EVANGELINE ABIOSEH JACKSON (NEE PRATT) - PLAINTIFF
AND
MRS HAJA ALARI COLE (NEE NOAH)
MR ALHAJI COLE - DEFENDANTS

COUNSEL:
G.K THOLLEY ESQ for the Plaintiff
R JOHNSON ESQ for the Defendant

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF APPEAL
JUDGMENT DELIVERED THE 9 DAY OF OCTOBER,2012

1. On 7 June,2010 the Plaintiff issued the writ of summons herein against the Defendants for, inter alia, a Declaration of Title in respect of land situate lying and being off Freeman Street, Hamilton measuring 0.1595 acre delineated in survey plan LS491/06 dated 24 May,2006. On 10 June,2010, her Solicitor's clerk and process server, Zeph Smith, deposed and swore to an affidavit that on 8 June,2010, he had attempted to serve the 2nd Defendant with the writ, but that he had threatened to get his boys to beat him up, and that he was chased out of the residence. But at the same time, he indorsed on the back of the writ that he had effected service on both Defendants. This was obviously untrue. Even if one were to accept that the 2nd Defendant indeed threatened the process server, Mr Smith does not state clearly in his affidavit that he did serve 2nd Defendant with the process. Mr Smith tried to bolster the contents of this affidavit with another affidavit deposed and sworn to by him on 16 June,2010 in which he merely reiterated the matters he had deposed to in the earlier affidavit.
2. On the very day, i.e. 7 June,2010 Plaintiff issued the writ, she also instructed her Solicitor to file an Application in this Court for an Injunction. The writ is not exhibited to the affidavit in support of that Application. When that Application came up before me for hearing on 10

June,2010, Mr Tholley, Plaintiff's Counsel could not proceed because, even though the Deponent referred to certain documents as being exhibited to her affidavit, they were not in fact so exhibited. Hearing was therefore adjourned to 15 June,2010. On the adjourned date , Mr Tholley proceeded with his Application. By then, the writ of summons had been exhibited to a further affidavit deposed and sworn to by the Plaintiff on 11 June,2010. I declined to grant the Orders sought because there was then no evidence before me that the Notice of Motion which purported to be an inter partes Motion, because it was addressed to the Defendants, had been served. Hearing was therefore adjourned to 17 June,2010. At this hearing, I was still not satisfied that the Defendants had notice of the proceedings, and I therefore Ordered that Notice of the next hearing be served on them by pasting Notice of the same on a prominent part of the Law Courts' Building, and by publishing the same once, in a newspaper. I adjourned to 23 June,2010. At this hearing, the affidavit evidence showed that the Notice of Motion had indeed been published in the Standard Times Newspaper of 22 June,2010 but not Notice of the new hearing date, which was one of the directions given by the Court. This was important, because the date fixed in the Motion for its hearing, 7 June,2010 had already passed. There was therefore a further adjournment to 25 June,2010.

3. At this hearing on 25th June, the Defendants were in Court and Mr Johnson appeared for them. Mr Johnson said the writ of summons had not been served on the Defendants. He said they got notice of it through the publication in the Standard Times Newspaper. I have hinted above, that based on the process server, Mr Smith's own account of how he supposedly served the process, it is more likely than not that the writ was not served on the Defendants. Mr Johnson intimated that he would be applying to the Court for an Order that service of the writ be set aside. I directed that the Defendants could challenge service by way of an affidavit in opposition, without the necessity of filing a fresh motion which action would necessitate additional Costs, as I was already seised of the matter. Mr Johnson accepted the Court's direction. The hearing was adjourned to 29 June,2010.
4. At the hearing on 29th June, the Defendants had filed two affidavits in opposition deposed and sworn to by the two of them on 28 June,2010.

Before dealing with these affidavits, I shall first return to Plaintiff's 2nd affidavit of 10 June,2010 to which, certain documents were exhibited. It is noteworthy, firstly, that she has not exhibited any documentary title to the property she claims in her own name, or in the name of her grandfather Walter Renner, or of her parents Mr John and Mrs Juliana Pratt. She has merely exhibited a survey plan LS491/06, in her name, and an earlier one LS731/62 dated 18 June,1962 in the name of one of her presumed predecessors-in-title. Her claim, as set out in the writ of summons, and in Mr Tholley's letters of 22 April and 31 May,2010 respectively are based solely on her say-so. She has not explained why she cannot produce any documentary evidence of her title to the property, save for the two survey plans she has exhibited to her 2nd affidavit.

5. I shall therefore turn my attention to the respective affidavits in opposition deposed and sworn to by the Defendants. In her affidavit, the 1st Defendant, Mrs Cole deposes that she was never personally served with the writ of summons. In view of what I have said above, I believe what she says. She got to know about the proceedings from the Standard Times publication. She says she inherited the property from her father Mohamed Issa Noah. Deed dated 29 January,1988 and duly registered as No.179 at page 120 in Volume 411 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown is evidence of her entitlement. Her narrative is as follows: Sometime in February,2010, the Plaintiff suggested she, the 1st Defendant, had trespassed on her, Plaintiff's land. A joint survey was agreed, to determine if this was so. It was carried out by the parties' respective surveyors, in the presence of the parties, the Plaintiff's son, Julian Jackson, and the 1st Defendant's caretaker, Oju Hamilton. The conclusion reached was that 1st Defendant had not trespassed on Plaintiff's property. Julian Jackson told Plaintiff in the presence of the others that the allegations of trespass on the part of 1st Defendant, were erroneous. Plaintiff and her son then begged for an amicable settlement. None of what the 1st Defendant has deposed to, has been contradicted by the Plaintiff. In civil proceedings, the standard of proof is a balance of probabilities. If one party makes an assertion, and the other fails to challenge it, the Court is duty bound to accept and

to rely on the unchallenged assertion. This principle applies as much to the grant of an Injunction, as to a trial of the facts in issue.

6. The principles applicable specifically to the grant or refusal of an Injunction are well known, and have been set out in many cases before and I rely on what I said in the case of CC 11/09 - SONNY DAVIES v THE MINISTER OF LANDS & Others - Judgment delivered 12 April,2011- *" The reason why I have taken pains to set out the Plaintiff's claim, is that in an Application of this nature, I must first decide whether the Applicant has a good arguable claim to the right he seeks to protect. In the case of C.C. 305/08 OSMAN KAMARA v The Former Executive of the Motor Drivers and General Transport Workers Union & others - Judgment delivered 7 October,2008, on an Application for an Injunction argued by Counsel for the Plaintiff in this matter, I set out the principles applicable where a Plaintiff seeks an Interlocutory Injunction, and I stand by those principles. There, I said inter alia at paragraphs 21&22: "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."

7. The Plaintiff has not shown that she has a good arguable claim to the right she seeks to protect; nor has she shown that there is a serious issue which needs to be tried. At this stage, I do not have decide the merits of either side's claim, but the Plaintiff has not proferred any evidence that the Defendants are, together or separately, trespassing on her property. In fact, the evidence discloses that she may have been harassing the Defendants for an amicable settlement of nothing - a clear case of something for nothing. If what 1ST Defendant deposes was said by the Plaintiff's son in her presence was untrue, the least I would have expected from Plaintiff would be an unambiguous denial from her. Her Solicitor's response to some of the allegations made by the Defendants dated 31st May,2010 - exhibit E to Plaintiff's affidavit, are quite ambiguous and vague. There is no specific denial of what Plaintiff's son said in her presence. The allegation was specifically put in Defendants' Solicitor's letter to Mr Tholley, dated 29 April,2010 - exhibit D to Plaintiff's affidavit. It follows that Plaintiff's claim for an Injunction lacks merit and must fail.
8. I now turn to the issue of the non-service of the writ of summons. This is where the 2nd Defendant comes in. As the 1st Defendant has made clear, 2nd Defendant has nothing to do with her ownership of the land she says is hers. He narrates what transpired on 8 June,2010. He deposes that "*...I was at my residence at 7B Peninsular Road, Freetown when a gentleman came to the premises and asked to see my wife Mrs Cole. I told him that my wife was not in. I asked why he wanted to see my wife Mrs Cole. He told me that he had a letter from a lawyer for my wife. I then telephoned my wife who was by then at Newton Village. My wife told me to request the gentleman to take the letter to her lawyer at Lamina Sankoh Street, Freetown. The gentleman then asked for Mr Cole. I then grew suspicious of him because he had not identified himself or showed me any identity card. I then told him that my wife had requested me to tell him to take the letter to her lawyer. The gentleman then left. The gentleman never told me that he had a writ of summons to serve on me or*

the 1st Defendant. He told me that he had a letter from a lawyer. That contrary to what is deposed in the affidavit of Zeph Smith.....I never threatened him or chased him out of my residence. The contents of that paragraph are palpably false. That the gentleman who came to my residence on the 8th of June,2010 never left any document at the premises."

9. I must say that the 2nd Defendant sounds very truthful. He was in Court on 25th and 29th June,2010 respectively, and I was able to observe his demeanour. His account of what transpired on 8th June has not been contradicted by any other evidence. It was open to Mr Tholley to cross-examine him on his affidavit in order to test his veracity, but he chose not to do this.
10. As I have hinted above, I had considerable doubts whether the writ of summons had been served on either or both Defendants as claimed by Plaintiff Solicitor's clerk, Mr Smith. I have studied the contents of the entry in Mr Smith's way-book, exhibit "ZS2" to his affidavit deposed and sworn to on 16 June,2010. The relevant entry does not prove service. If anything, it proves the opposite. Nobody signed acknowledging receipt of the writ of summons, though this is not really a requirement of the Rules. It is quite probable that 2nd Defendant's version is indeed the true account of what transpired that day. I accept and believe the contents of paragraph 12 of 2nd Defendant's affidavit, that he only got to know about these proceedings from the Standard Times Publication of 22 June,2010. I find that the writ was not served in the manner required by the Rules of Court. I therefore have no hesitation in setting it aside.
11. I THEREFORE make the following Orders:
    i. Service of the writ of summons issued on 7 June,2010 on the Defendants, is hereby set aside as the same was not served personally as required by Rules of Court.
    ii. Plaintiff's Application for an Interim and Perpetual Injunction is dismissed as it lacks merit
    iii. The Plaintiff shall pay the Costs of this Application, such Costs to be taxed if not agreed.

THE HONOURABLE MR JUSTICE N CBRWONE-MARKE.