CC. 361/19 2019 M. N0. 25

In the High Court of Sierra Leone

(Land, Property and Environmental Division)

Between:

Teresa Agnes Momoh - 1st Plaintiff

4420 Reverend Davies Drive

Upper Marlboro

Maryland 20772

United States

Jane Frances Momoh - 2nd Plaintiff

4607 Sutherland Circle

Upper Marlboro

Maryland 20772

United States

Yvonne M Thompson - 3rd Plaintiff

(Nee Wilkinson)

12007 Bronze Gate Place

Silver Spring

Maryland 20904

United States

(By Their Attorney, Victoria H. Sesay)

Thomas Bernard Momoh - 4th Plaintiff

B22 King Harman Road

Freetown

And

Paulina Samba - Defendant

107 Wilkinson Road

Freetown

Counsel:

Defendant/Applicant: Charles F. Margai Esq.

Plaintiffs/Respondents: Berthan Macauley Esq.

Ruling on an Application on Whether this Matter can be Determined without a Trial (Disposal on a Point of Law); Whether that Determination, if at all, will Amount to an End of this Action, in this Honourable Court, Subject Only to a Possible Appeal to a Superior Court of Appellate Jurisdiction; Whether the Plaintiffs herein are the Competent Persons to Prosecute this Action etc. Delivered by The Honourable Justice Dr. Abou B.M. Binneh-Kamara, on Thursday, the 8th of December 2022.

1.0 Introduction

This ruling is constructed on an application made to this Honourable Court by Charles F. Margai Esq., (hereinafter referred to as Counsel for the Applicant), pursuant to a Notice of Motion, dated 20th October 2020. Thus, as required by Order 31 Rules 1 (4), (6) and (7) and 5 (1) and (2) of the High Court Rules, Constitutional Instrument N0.8 of 2007 (hereinafter referred to as the HCR, 2007), the application is bolstered by the affidavit of one Ms. Eluma Nora Margai of N0. 13 Nylander Street, Aberdeen, Freetown, of the Law Firm of C. F. Margai and Associates (Banta Chambers, 46 Rawdon Street, Freetown), sworn to and dated 20th October 2020. The content of the application, purls around the following six (6) orders, which Counsel for the Applicant, has requested this Honourable Court to grant:

That the action hereinafter initiated C.C. 361/19 M. N0. 25 - Between Teresa Agnes Momoh and three others (Plaintiffs) and Paulina Samba (Defendant) is: -

(a) One suitable for determination without a full trial of the action

(b) That the determination will finally determine the same, subject only to a possible appeal, of the entire cause or matter or any claim or issue in the cause or matter.

1. That the Respondents are not competent to prosecute the claim herein which is predicated on ownership of the land in dispute, assuming without conceding that they were begotten by Mr. Albert Jerome Momoh, the testator herein, whose will, and testament was probated on the 29th of April 1968, without more.
2. That the 3rdRespondent, Yvonne M. Thompson was deceased subsequent to the issuance of the writ of summons and therefore cannot continue in the above capacity without substitution or continuation of her claim.
3. That by reason of the above, the said action be struck out.
4. Any other relief which the court deems necessary to be granted to the Applicant to meet the justice of the case.
5. Costs.

Contrariwise, on 24th October 2020, the law firm of Basma and Macauley, of 26 Main Motor Road, Brookfields, Freetown; filed an affidavit in opposition, sworn to by one Joanne Adebisi Marylene Wellington, in response to the supporting affidavit of the application of 20th October 2020. Indeed, both affidavits contain very interesting facts, resonating with this matter, that will certainly embolden this Honourable Court to determine whether the foregoing application, should or should not be granted. However, in the meantime, I will proceed to present the arguments of Counsel for the applicant in justification of why he thinks that this Honourable Court is obliged to grant the application. Further, I will as well

sequentially present, the submissions of Counsel for the Respondents, regarding why he thinks the application should not be granted.

1.1 <u>The Submissions of Counsel for the Applicant</u>

Counsel for the Applicant on the 5th of November 2020, made the following submissions:

1. That there are six (6) exhibits attached to the application's supporting affidavit, marked Exhibits ENM1-6. Exhibit ENM1 is the writ of summons, initiating this action; it is dated the 1st of July 2019. Exhibit ENM2 comprises the memorandum of appearance and the notice of entry of appearance. Exhibit ENM3 is the Applicant's statement of defence to the statement of claim, enshrined in the writ of summons. Exhibit ENM4 is the reply to the Applicant's statement of defence. Exhibit ENM5 is the application for direction by summons. Exhibit ENM6 is this Honourable Court's order for direction, made on 29th January 2020.
2. That the application is twofold: whether the Respondents are not competent to prosecute the claim herein which is predicated on ownership of the land in dispute, assuming without conceding that they were begotten by Mr. Albert Jerome Momoh, the testator herein, whose Will, and testament was probated on the 29th of April 1968, without more. Whether the 3rd Respondent, Yvonne M. Thompson was deceased subsequent to the issuance of the writ of summons and therefore cannot continue in the above capacity without substitution or continuation of her claim.
3. There is an affidavit in opposition, sworn to by one Joanne Adebisi Marylene Wellington, on 24th October 2020. In that affidavit, it is made very clear in

Paragraph 4 that the Respondents' solicitors are waiting for instructions from their clients, regarding whether the deceased Respondent died testate or intestate. This instruction is crucial because it will determine the next cause of action of their solicitors. This fact, as deponed, is quite restrictive to the 2nd Order; and it does not say anything about the 1st Order.

4. That notwithstanding the fact that probate has been taken out, based on the will that is attached as an exhibit to the said affidavit, the property should have been vested in the Respondents by a vesting deed, which should have qualified them to be owners of the realty; and in the absence whereof, they can best be described as mere beneficiaries of the estate; and this is a fact which the Respondents have not disputed. Thus, on this point, Counsel relied on the Supreme Court decision of 4/2005 (Judgment delivered on 18th July 2008) in which Berthan Macauley Esq. appeared for the Appellant (Sierra Leone Enterprises Limited **v.** The Attorney-General and Minister of Justice: the 1st Defendant and The Minister of Lands, Housing and the Environment: the 2nd Defendant (see Page 4 of Paragraph 34 of the said Judgment).
5. Concerning the 1st Order, Counsel refers this Honourable Court to the authority of Mustapha Rufai Ojikutu, etc. **v.** Bintu Fatumo Fella (1954), Lagos, WACA (See page 628). Thus, this authority confirms that without a vesting deed the ownership of the property does not pass to the Respondents. Notwithstanding the availability of the will, the property remains vested in the executors and therefore any action, affecting the estate, should be at the behest of the executors of the will and not the beneficiaries. This legal truism is akin to the position on under the

Administration of Estates Ordinance, Cap. 45 of the Laws of Sierra Leone, 1960.

6. In circumstances wherein someone dies intestate, before Letters of Administration are taken, the estate vests in the Administrator and Registrar-General. Thus, any person meddling with the property at that stage, will be considered an interloper, by reason of the fact that the property has not been vested in the beneficiaries. Counsel submits that this is a fitting case to apply the provisions of Order 17 of the HCR, 2007.

1.2 <u>The Submissions of Counsel for the Respondents</u>

In contradistinction to the aforementioned submissions, Counsel for the Respondents, first noted the issue of whether legal title is vested in the Respondents, in the absence of a vesting deed. He further referenced the allusion to Paragraph 5 of the affidavit in opposition, noting that Counsel on the other side, said that the response therein concerned the 2nd Order and that nothing was said about the 1st Order as prayed. He emphasised that Paragraph 3 of the same affidavit, which makes a very clear reference to the testator's last will and testament, confirms the fact that the said will has been accordingly probated. The paragraph thus reads:

> That the writ of summons issued in the above action is exhibited as Exhibit ENM1 in the affidavit in support. That in Paragraphs 2 and 3 of the … writ of summons references were made to (i) the Last Will and Testament of Albert Jerome Momoh, dated the 15th of September 1966 and (ii) the grant of probate of the will on the 29th of April 1968 (Probate) respectively. Copy of the said Probate (including the will is shown to me and exhibited herein and marked Exhibit JW1. That I am shown a letter dated the 3rd of August 2017

addressed to Berthan Macauley Jr. (sic) which is exhibited thereto and marked Exhibit JW2.

Counsel also drew the Court's attention to clause 13 of the will, which clearly makes a devise to several beneficiaries, including the Respondents, noting that the foregoing paragraph in the said affidavit, contains the factual basis of his legal submission. Therefore, it is not quite accurate to say that the affidavit in opposition limits its contents to the 2nd Order. Counsel furthered that the case law, which the other side has relied on is the Nigerian authority of Mustapha Rufai Ojikutu, etc. (Appellants) **v.** Bintu Fatumo Fella, West African Court of Appeal, Nigeria (1954). He flagged up the position of the Nigerian Court of Appeal on the issue in question, adding that the court held that, 'if the will sued upon was of effect, the legal estate vested in the trustees, and the Plaintiffs could not maintain an action for account against a debtor to the trust estate'.

Counsel argued that the Court did not say that if property is devised to beneficiaries under a will and probate is taken of that will, legal title does not pass to them, unless and until a vesting deed has been executed in their favour. He added that it is implicit in the 2nd Order that there is a will and that probate of that will had been taken; stressing that the position in Sierra Leone, regarding this issue was addressed in the case of Gooding **v.** Allen ALR S.L Series {1937-1949} Page 334-336. Thus, on the strength of the foregoing authority, Counsel said prior to 1897, there was need for assents from personal representatives, concerning devised realties. He stated that under the Land Transfer Act of 1897, realties were vested in the personal representatives, who then executed vesting deeds in favour of beneficiaries. He pontificated that the requirement for an executor to vest real property in the beneficiaries for the latter to have legal titles was a requirement of

the Land Transfer Act of 1897, adding that according to Page 335 of the said authority, there is no need for a vesting deed (vesting assent) when probate has been taken. Counsel also submitted that the other side's reliance on the Sierra Leone Enterprises Ltd. **v.** The Attorney-General and Minister of Justice (1st Defendant) and The Minister of Lands, Housing and the Environment (2nd Defendant) {SC 4/2005}, does not bolster their argument any further, because the authority concerns the acceptance of material facts in affidavits. He cautioned that this does not presuppose that the mere acceptance of certain facts in an affidavit, amounts to conceding to the application before the Court.

1.3 <u>The Reply to Counsel for the Respondents' Submissions</u>

Counsel for the Applicant, in reply to the foregoing arguments, first noted that the High Court authority of Gooding **v.** Allen (supra.), which Counsel for the Respondent relied on, had been overturned by the Court of Appeal in Georgiana Lucrettia Rose and Others (Appellants) **v.** Jacob Williamson Sawyer and Others (Respondents) (Civil Appeal 14/61). He furthered that Paragraph 4 of the opposing affidavit acknowledged the death of the 3rd Respondent, and no application was made for substitution or discontinuance of the action; adding that Order 18 Rules 7, 9 and 18, which Counsel on the other side referenced, do not really help the Respondents' case.

Nevertheless, the foregoing contents clearly depict the arguments and counterarguments for and against the application. At this stage, it is the responsibility of this Honourable Court to determine whether the application is conspicuously supported by law. In doing so, I will systematically unpack both

Counsel's submissions and examine them in the context of the substantive and adjectival laws, which they have both relied on.

1.4 Analytical Exposition I: The Adjectival Law on Disposal of Cases on Points of Law

The first order as prayed is that this action is one suitable for determination without a full trial; and that the determination will fully determine same, subject only to a possible appeal of the entire cause or matter or any claim or issue in the cause or matter. Counsel for the Applicant rationalised the need to grant this order in the two other immediate subsequent prayers that came after it. Nevertheless, it is rationally and legally expedient, to first examine the very provision in one of Sierra Leone's prominent adjectival law, pursuant to which the application is made. That is, The HCR, 2007; particularly Order 17 of same, which generically concerns determination of question of law or construction. Thus, Paragraphs (a) and (b) of Sub-rule (1) of Rule 1 of Order 17 thus reads:

> 'The Court may on the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that (a) the question is suitable for determination without a full trial of the action and (b) the determination will finally determine subject only to any possible appeal the entire cause or matter or any claim or issue in the cause or matter'.

Thus, the authors of the English Supreme Court Annual Practice 1999, extensively unpacked the criteria that shall be met for courts of competent jurisdictions to grant such orders; and the significance of Order 17 (in the civil litigation process) in their quite pedantic analysis found between paragraphs 14A/1 and 14A/2 of Pages 199 to 202. Essentially, a point which the said authors made quite valent is that the

foregoing provision has to be read and interpreted in tandem with particularly Orders 16 (dealing with summary judgment) and 21 Rule 17 (concerning the striking out of pleadings by courts of competent jurisdiction). Circumspectly, an analysis of the above provision, consequent on the analytical exposition in the English Supreme Court Annual Practice 1999, depicts the following salient points about the aforementioned provision. First, it is entirely directory and (not mandatory). This is by virtue of the semantic value of the auxiliary verb 'may' as used in the very sentence preceding Paragraph (a) of Sub-rule (1).

Second, the disposal of any matter on a appoint of law, can be done pursuant to an application made by either of the parties to a litigation, or by the Court on its own volition. Third, in circumstances where the Court is bound to deal with the construction of any document, it can at any stage of the proceedings do so, where it is inter alia satisfied, that such task can be done, without any need for a trial. Analytically, the foregoing interpretation of the provisions in Order 17, strikes a chord with that of the Hon. Mr. Justice Fynn, J. A. in Betty Mansaray and Others **v.** Mary Kamara Williams and Another (Misc App. N0. 4 of 2017) {2018) SLCA 1277 (10th June 2018).

Meanwhile, in circumstances wherein the Court is bound to deal with the construction of any document, it can at any stage of the proceedings do so, where it is inter alia satisfied, that such task can be done, without any need for a trial. Nonetheless, this Honourable Court is mandated not to determine such a question, unless the parties have had an opportunity of being heard on that question; or consented to an order or judgment on the determination {see Sub-rules (3) and (4) of Rule 1 of Order 17 of The HCR, 2007}. The significance of Order 17 applications

is seen in the basic facts that they can save the courts, the barristers and the litigants, from going through the protracted trial processes, that are quite expensive and time consuming. Essentially, should the facts of a case depict that it can be disposed of on a point of law, it would be therefore legally and rationally expedient for it not to proceed to trial.

1.5 Analytical Exposition II: The Substantive Law on Succession and Inheritance that is Cognate with the Application

Counsel for the Applicant's submissions concern a plethora of issues, relative to testate and intestate successions, but Counsel for the Respondent, basically restricted his arguments to the law on testate succession in Sierra Leone. However, the principal thrust of the application, swirls around the applicable law on testate succession, but since allusions are made to intestate succession in the submissions of Counsel for the Applicant, I will examine those salient bits of the law that are germane to both testate and intestate successions. Further, I will confine this analysis to the valent thematic issues on succession and inheritance that will undoubtedly form the basis of this Honourable Court's decision in the determination of the application (in tandem with the authorities on which Counsel have built their arguments).

In general, the law on succession and inheritance is intertwined with a plethora of issues in the law of real property and equity and trusts. Thus, the Wills Act of 1837 (which is applicable in our jurisdiction by virtue of section 74 of the Courts Act of 1965) is very instrumental in the determination of issues, relative to testate succession. Judicially, a will as defined by Sir JP Wilde in Lemage **v.** Goodban (1865) LR 1 P & D 57 is '… the aggregate of {a man's} testamentary intentions, so far as

they are manifested in writing, duly executed according to statute'. This definition dovetails with that in Re Berger (1989) 1 All ER 591, which was also adopted in Baird **v.** Baird (1990) 2 A.C. 548 (30th April 1990). That definition states that a will is 'an instrument by which a person makes a disposition of his property to take effect after his decease which is in its own nature ambulatory and revocable during his lifetime'.

Thus, section 9 of the Wills Act of 1837 makes it mandatory (not directory) that every will shall be underscored by specific characteristic features. Essentially, the fundamental elements of a will are that: It is a legal mechanism for expressing testamentary intentions. It must be in writing. It must be duly executed. It is ambulatory in nature. And it is revocable in nature as well. Thus, the validity of a will is consequent on two conditions: It must comply with the formalities of the Wills Act of 1837 and the testator must have the mental capacity to make it. Thus, a will must be signed at the end by the testator, or by someone authorised by him, and the signature must be made or acknowledged, in the presence of at least two witnesses, present at the same time, who must themselves sign it or acknowledge their signatures in the testator's presence.

Further, according to section 15 of the Wills Act of 1837, a will witnessed by a beneficiary or the beneficiary's spouse is not void, but the gift to that beneficiary or spouse is void. The persons appointed by a will to administer the testator's estate are the executors. A deceased person's property is in the care of his executors, who are empowered to deal with it as directed by the will from the time of the testator's death. The executors must, however, usually obtain a grant of probate from the High Court of Justice, in order to prove the will and to confirm

their right to deal with the estate. Appointment as an executor confers only the power to deal with the deceased ‘s property in accordance with his will and does not give them beneficial ownership, although an executor may also be a beneficiary under a will.

The executors are mere trustees, who are also in a fiduciary position, by virtue of their appointments by the testator. The executors are holding on to that which is devised and bequeathed to the beneficiaries on trust. So, ideally, the executors are the persons that can sue or be sued in respect of the testator’s estate (which is devised and bequeathed to the beneficiaries). Thus, the question that can be raised at this stage, is whether the beneficiaries are proscribed by any law (in our jurisdiction), from bringing actions as Plaintiffs, regarding the enforcement of their beneficial interests, under wills, even in circumstances, wherein such wills have been probated, but vesting deeds are yet to be taken out?

This question also points to the need to pose some other questions: If per adventure the executors that should facilitate the process of vesting the deceased’s estate on the beneficiaries, delayed in doing so or cannot do so, because of infirmity of body and mind, death or some other extraneous considerations, can the beneficiaries take the apposite steps to do so? Again, how can the testator’s intentions be given effect to by a court of competent jurisdiction in a circumstance wherein a will has been probated, but a vesting deed is yet to be taken out? Which role can the Court (as an arbiter of justice) play in giving effect to the testator’s intentions?

Thus, the answers to the foregoing questions will certainly unfold as the analysis progresses. However, the position of the law on intestate succession is principally

within the purview of the Devolution of Estates Act N0.21 of 2007 and the Administration of Estates Ordinance, Cap. 45 of the Laws of Sierra Leone, 1960. The beauty of Act N0.21 of 2007 (which amended specific portions of Cap. 45) is that it tentacles take in issues of both testate and intestate successions. Thus, originally, Cap. 45 of the Laws of Sierra Leone 1960, was not applicable to intestate successions, regarding the estates of Muslims. The estates of Muslims who died intestate, were statutorily administered under Cap. 96 (The Mohammedan Marriage Ordinance) of the Laws of Sierra Leone, 1960.

Nonetheless, the estates of Muslims, who died intestate can now be administered, pursuant to the provisions of Act N0.21 of 2007. Section 38 of same accordingly amended Subsection (1) of Section 9 of the Mohammedan Marriage Ordinance, Cap. 96. However, what is more important for this analysis is that, both Cap. 45 and Act N0.21 of 2007, clearly deal with issues of intestate succession alluded to by Counsel for the Applicant. The position of the law, concerning intestate succession in both statutes is this: When deceased persons did not will their estates to any beneficiaries, their spouses are bound to take out Letters of Administration in the Probate Registry of the High Court of Justice. This done, they must proceed to take out vesting deeds in respect of such estates. Further, Order 55 of The HCR, 2007, deals with contentious probate proceedings. Rule 2 (3) of same, which concerns parties to actions for revocation of grant thus provides:

> 'Every person who is entitled or claims to be entitled to administer the estate of a deceased person under or by virtue of an unrevoked grant of probate of his will or letters of administration of his estate shall be made a party of any action for the revocation of a grant'.

However, in circumstances wherein Letters of Administration have not been taken, the estates vest in the Administrator and Registrar-General, until that statutory procedure is fulfilled. Thus, in such circumstances persons meddling with such estates are considered interlopers, because the estates have not yet been vested in the beneficiaries.

1.6 <u>Critical Context: Unpacking Counsel's Arguments and Examining their Validity in the Context of the Applicable Law</u>

Having explored the substantive and adjectival laws that are cognate with the application, I will now proceed to relate them to the arguments of Counsel. The question that is to be posed at this stage, is whether the application meets, the threshold for the 1st Order to be granted.

Truth be told, it would be unfair to determine this question, when the very legal issues that necessitated the quest for that order, have not yet been determined. The 1st Order is so craftily constructed that its deconstruction is contingent on the deconstruction of the very legal points, upon which it is built. The first block of the legal pillar upon which it is constructed is seen in the 2nd Order as prayed, 'That the Respondents are not competent to prosecute the claim herein which is predicated on ownership of the land in dispute, assuming without conceding that they were begotten by Mr. Albert Jerome Momoh, the testator herein, whose will, and testament was probated on the 29th of April 1968, without more'.

Meanwhile, on this point, Counsel for the Applicant stressed that Paragraph 4 of the opposing affidavit (quoted above) is very restrictive in content; as it addresses the issue and facts-in-issue that are germane to just the 2nd Order, noting that nothing is said about the 1st Order. He also pontificated that, that 2nd Order is

requested because probate has been taken (based on the will as annexed), but the property should have been vested in the Plaintiffs by a vesting deed, which should have qualified them to own the property; and that in the absence thereof, they can only be properly described as mere beneficiaries of the estate; adding that this fact has not been disputed by the Respondents.

Moreover, Counsel relied on the Supreme Court authority of Sierra Leone Enterprises Ltd. **v.** The Attorney-General and Minister of Justice (1st Defendant) and The Minister of Lands, Housing and the Environment (2nd Defendant) (supra.) in justification of the last limb of his submission. Significantly, whilst deconstructing the foregoing submissions for meanings, I reckoned that it is two-fold in content. The first relates to the position of the law, concerning whether established and acknowledged beneficiaries are proscribed by law from bringing actions as plaintiffs, regarding the enforcement of their beneficial interests, under wills, even in circumstances, wherein such wills have been probated, but vesting deeds are yet to be issued in that respect.

The second dovetails with the assumption that because Paragraph 4 of the opposing affidavit, does not seemingly address the issue and facts-in-issue that are cognate with the 2nd Order, that presupposes that the other side has actually adduced no affidavit evidence in contravention of that 2nd Order. And should this supposition turn out to be true, then the authority of Sierra Leone Enterprises Ltd. **v.** The Attorney-General and Minister of Justice (1st Defendant) and The Minister of Lands, Housing and the Environment (2nd Defendant) (Supra.), applies as a matter of strictissima juris. Thus, I will deal with the two issues, by starting with the second point.

First, I will say, the second point is completely factual; it concerns the materiality of specific facts deponed to in the opposing affidavit. Contrariwise, Counsel for the Respondents, argued that it does not mean that because Paragraph 4 of the opposing affidavit, does not appear to have adduced facts in contradistinction to the 2nd Order as prayed, that Counsel on the other side, should delude himself into thinking that the Respondents, have conceded to that order. He alluded to Paragraph 3 of the opposing affidavit, which makes a very clear reference to the testator's last will and testament and to the fact that the said will has been accordingly probated. He cautioned that this does not point to any fact that they have not denied the 2nd Order.

Nevertheless, after having clearly perused the authority of Sierra Leone Enterprises Ltd. **v.** The Attorney-General and Minister of Justice (1st Defendant) and The Minister of Lands, Housing and the Environment (2nd Defendant) (Supra.), I am of the conviction that the aspect of the Judgment which Counsel for the Applicant relied on, has not supported his submission that because Paragraph 4 of the opposing affidavit does not expressly contravene the 2nd Order, therefore the other side has conceded to that order. This submission appears to be far-fetched from what the Honourable Justices of Sierra Leone's Supreme Court had to say on Page 4 on affidavit evidence and I quote:

> '… Affidavit evidence of the Plaintiff has not been controverted. The position of the law is where material facts in support of an application have not been controverted by the Defendants, the facts contained in the said affidavit in support are to be taken by the Court to be true'.

Thus, it is clear that from the foregoing authority, the Supreme Court was quite pedantic, circumspect and trite about the relevance, admissibility and weight of

pieces of affidavit evidence that have neither been expressly challenged nor contradicted in a civil litigation. In the instant case, the fact that a piece of affidavit evidence is neither challenged nor contradicted, does not necessarily mean that the other side has conceded to the application, regarding the 2nd Order. In fact, as shown above, specific facts and facts-in-issue, were adduced in contravention of the facts by which that order is anchored. Further, the materiality of the facts, upon which Counsel for the Respondent has relied, in negating that 2nd Order, have not even been contradicted by Counsel for the Applicant.

So, as it stands, such facts are not in dispute. Thus, the material facts that there was a devise to the beneficiaries under the will and that probate of that will has been taken, are very clear facts embedded even in the notice of motion, seeking the aforementioned orders; and that those same facts are quite conspicuous in the opposing affidavit of Joanne Wellington. Circumspectly, bearing in mind Counsel for the Respondents' submission that Paragraph 3 of the opposing affidavit, clearly contravened the facts and facts-in-issue upon which the 2nd Order is built and the fact that Paragraph 13 of the will (as probated) conspicuously describes the Respondents in this action as beneficiaries, and these facts have been acceded to by Counsel for the Applicant in his notice of motion of 20th of October 2020, it is but fair and proper to say that on the strength of the Supreme Court authority in The Sierra Leone Enterprises case (Supra.), such facts are true and are therefore accepted by this Honourable Court as such.

Nonetheless, I will now proceed with the first issue, which is a point of law (and not one of fact). The point of law that certainly resonates with the second issue is, where there is a devise under a will and probate of that will has been taken;

whether a vesting deed is required by law (as a matter of strictissima juris) to confer legal title to the beneficiaries for them to be able to institute proceedings in their names. This legal issue is the basis for the 2nd Order as prayed, consonant with the provision in Rule 1 of Order 17 of The HCR, 2007. Consequent on this same order, Counsel for the Applicant, referenced the Nigerian authority of Mustapha Rufai Ojikutu, etc. (Appellants) **v.** Bintu Fatumo Fella (Supra.).

Thus, it is very important to briefly examine the facts of this case, as summarised by Coussey J. A. (the presiding Judge), in tandem with its ratio decidendi, to determine whether they clearly strengthen or undermine the application to be determined. The action in the instant case was brought by two Plaintiffs by themselves and other beneficiaries under a will for an account from the Defendant of rents and profits collected by her as the Plaintiffs' agent in respect of premises described as N0.39 Agarawu Street, Lagos. By the statement of claim the Plaintiffs averred that by the will the property referred to was therein devised to them and the Defendant with certain directions.

It is clear from this averment that, pursuant to the will, the Plaintiffs and the Defendant are beneficiaries of the devised estate. Contrary to the terms of the will, the Defendant admitted that the property had been devised as the Plaintiffs had alleged. The Defendant, however, pleaded that the matters in issue were res judicata by virtue of a consent judgment in the Supreme Court (now High Court) in suit N0. 376/1938, between the parties to this suit wherein it was declared, that the property in the writ of summons mentioned was family property and that the testatrix, Osenatu Osikeosi, had not an absolute power of disposition, thereof so as to make the trust or bequeath any legacy therefrom to the Plaintiffs.

The Plaintiffs appealed and their appeal was allowed by the West African Court of Appeal on the 17th of November 1953, on the ground that there was no evidence before the court to establish that the alleged consent so bound the Plaintiffs so as to constitute res judicata. The Appeals Court then ordered a re-trial of the suit. Thus, when the matter was re-heard in the High Court, Gregg J. dismissed the Plaintiffs claim on a point, which is somewhat important for the determination of this application. That is, whether the Plaintiffs are not entitled to sue the Defendant for an account. On this point Coussey J. A. held as follows:

> 'If the will upon which the Plaintiffs sued is of effect the legal estate in the property mentioned vested in the trustees of the will. The Plaintiffs have no interest in the legal estates. Their interest is to have their legacies paid from time to time out of the income of the estate {my emphasis is underlined}. If the Defendant is intermeddling with the estate to the Plaintiffs' detriment, the proper cause seems to be to apply for appointment of a new trustee. Then, if the Defendant is disturbing the legal estate, the Plaintiffs, although they may not institute legal proceedings in the name of the trustee without his authority, may oblige the trustee on giving him a proper indemnity to lend his name for asserting the legal right. But the Plaintiffs cannot maintain an action for account against a debtor to the trust estate and that is what they alleged against the Defendant that she in effect is'.

Significantly, the first sentence of the foregoing portion of the Judgment is contingent on the content of the will, pursuant to which the action was brought by the Plaintiffs. Second, it is clear that the position of the Court was that, based on the content of the will, the property vested in the trustees and not the beneficiaries. The Hon. Justice Coussey J. A.; was very trite and lucid in his choice of words that '… the legal estate vested in the trustees…' according to the content of the will. Ordinarily, an executor (who is also a trustee), holds the estate in trust

on behalf of the beneficiaries. This is why it is also said that the trustee is in a fiduciary position. However, in the above case, 'if the will upon which the Plaintiffs sued is of effect the legal estate in the property mentioned vested in the trustees of the will. The Plaintiffs have no interest in the legal estate'.

They were not the owners of the fee simple absolute in possession according to the will; and were thus not entitled to the reversionary interest of the estate. The property was never devised to them (the Plaintiffs). Essentially, their equitable interest was to have '…their legacies paid from time to time out of the income of the estate…'; nothing more and nothing less. Further, it also came out clearly from the Judgment that: 'Contrary to the terms of the will, the Defendant admitted that the property had been devised as the Plaintiffs had alleged' (see Page 629). This makes it quite conspicuous that the Plaintiffs misunderstood the will's content; and did not even know that their interest in the testator's estate was merely equitable and not legal.

Most importantly, there is nowhere in the Judgment where the Hon. Justice Coussey J. A. said that if property is devised to beneficiaries under a will that has been probated, the legal interest does not pass to the beneficiaries, unless a vesting deed in respect of that property has been issued by the Probate Registry of the High Court of Justice. Thus, in Gooding **v**. Allen {1937-1949} A. L. R. S/L Series, the then Supreme Court (now High Court) addressed the position of the law, regarding whether legal interest vests in the beneficiaries, in respect of estates for which there have not been vesting deeds. It came out clearly in that case that, that position of the law, was depicted in the Land Transfer Act of 1897, which was not applicable in our jurisdiction, by virtue of the Courts Act N0. 31 of 1965.

In Page 335 of the Judgment, the Hon. Justice Beoku-Betts, Ag. J. made the apposite clarifications on this issue:

> 'By the Land Transfer Act, 1897, when real estate vested in the personal representatives instead of the devisees as hitherto, it was expressly provided that the executor must assent to the devise to transfer title to the devisee. The Land Transfer Act, 1897, is not in force in the Colony, as it was subsequent to 1880 (Supreme Court Ordinance, 1932 s.6), and therefore the requirement of the executor's assent is not operative in the Colony. The land devised by a testator vests immediately in a devisee…'

Analytically, on the foregoing authority, it is reasonable to conclude that if property is devised to beneficiaries under a will that has been probated, the legal interest passes to the beneficiaries, whether or not a vesting deed in respect of that property has been issued, by the Probate Registry of the High Court of Justice. Contrariwise, Counsel for the Applicant, in his reply to the submissions of the Respondent's Counsel, stated that the above authority had been overturned by the Court of Appeal decision in Georgiana Lucrettia Rose and Others (Appellants) **v.** Jacob Williamson Sawyer and Others (Respondents) (Civil Appeal 14/61).

In the instant case, the facts as summarised by Ames AG. P. (presiding, alongside Dove-Edwin J. A. and Marcus Jones Ag. C. J.) are that Jacob Williamson Sawyer, the testator, died testate in the Gold Coast in 1916. In his will, he left certain property to his sister, Ransolina Patience Cromanty, two brothers and two daughters in equal shares. Mrs. Cromanty who was the only surviving executor, obtained probate of the will in the Gold Coast in 1916, but did not obtain probate in Sierra Leone. Returning to Sierra Leone, she began to collect rents from the property. She did not account for the rent to anyone, despite repeated protests from other members of the family. In 1952 Mrs. Cromanty conveyed part of the property to

one Joseph E. Metzger, and in 1953 she conveyed another part to two grandnieces. Between 1948 and 1952 Mrs. Cromanty's nephew collected the rents from one of the properties, but in 1952 he returned the rents to the payers who handed them over to Mrs. Cromanty.

Mrs. Cromanty died in 1957 leaving the remainder of the property to certain named persons. Her nephew and the grandchildren and great-grandchildren of the testator brought suit against the executors and trustees of her estate claiming a beneficial interest in the property. The Supreme Court made a declaratory judgment in accordance with the claim, and the executors and trustees appealed. The West African Court of Appeal dismissed the appeal and held as follows:

1. That Mrs. Cromanty, taking possession of the property, became an executrix de sa tort.
2. That since she had full knowledge of the testator's devises, she held as trustee for the devisees; and that the declaratory judgment correctly included the property conveyed to Metzger and the two grandnieces, even though they were not joined by as Defendants.

Thus, the facts and ratio decidendi of the foregoing case are quite clear. There are certain salient issues that resonate with the above case that must be accordingly distinguished here. First, contrary to Counsel for the Applicant's submission that the Supreme Court decision in Gooding **v**. Allen (supra), was overturned in Georgiana Lucrettia Rose and Others (Appellants) **v.** Jacob Williamson Sawyer and Others (Respondents) (supra.) is quite inaccurate. There is nowhere in Ames Ag. P's. judgment (in the above case) in which he held (expressly or impliedly) that the decision in Gooding **v**. Allen (supra.), was overturned; neither was that said by

either of the other empaneled Justices that determined that appeal (Dove-Edwin J. A. and Marcus Jones Ag. C. J.). Secondly, Ames Ag. P's. rejection of the Appellants' Counsel's argument, based on the decision in Gooding **v.** Allen (supra.), does not presuppose that the very law upon which the argument was built was overturned; it was the argument that was denied and not the law upon which it was built. This was how the said Hon. Justice puts it:

> 'Mr. McCormack's main argument, as I understood it is this: In this country the devisee of land can, and should, enter in possession thereof upon the death of the maker of the Will. The Land Transfer Act 1897 is not law here, for which argument he relies on Gooding **v.** Allen (3 S. L. Recorder 69), where the Supreme Court so decided. Consequently, no assent from an executor is needed. Mrs. Cromanty did not reseal the grant of probate. She went into possession not qua executrix but as a squatter, except, of course as to any shares in any of the properties which she had in her own right. She was not a trustee. Time ran in her favour, and every other member of the family was statute barred long before her death. In the deed of gift to the grandnieces she recites her long and quiet possession as her title. I cannot believe that such a cynical argument can be sound. I prefer Mr. Marke's argument {my emphasis is underlined}'.

This confirms that the law as espoused in the Gooding **v.** Allen case (supra.) was not under any circumstance circumvented or overturned in Georgiana Lucrettia Rose and Others (Appellants) **v.** Jacob Williamson Sawyer and Others (Respondents) (supra.) by the Western Court of Appeal. Thirdly, the will pursuant to which Mrs. Cromanty was appointed as executrix was neither probated in Sierra Leone; nor was a vesting deed (in respect of the estate) devised to the beneficiaries, issued by the Probate Registry of the then Supreme Court. But even the beneficiaries' descendants (children, grandchildren and great grandchildren), whose legal interests in the estate, continued to subsist (without even a probate or

a vesting deed) were never prevented by neither the then Supreme Court, nor the West African Court of Appeal, from bringing actions as Plaintiffs, for the testator's (their grand and great grandfather's) wishes expressed in his last will and testament, to be given effect to. Thus, in the absence of a vesting deed, they successfully brought the action as Plaintiffs and their beneficial interest was accordingly declared.

Thus, on the authority of Gooding **v.** Allen (supra.) and Georgiana Lucrettia Rose and Others (Appellants) **v.** Jacob Williamson Sawyer and Others (Respondents) (supra.), it is clear that persons who are beneficially interested in devised estates are not proscribed by any law (in our jurisdiction), from bringing actions as Plaintiffs, regarding the enforcement of their beneficial interests under wills, in circumstances wherein such wills have been probated, but vesting deeds are yet to be issued by the Probate Registry of the High Court of Justice. Ideally, as indicated above, the executors are the persons that can sue or be sued in respect of the testator's estate (which is devised to the beneficiaries).

But what happens, if per adventure, the executors that should facilitate the process of vesting the testator's estate on the beneficiaries, delayed in doing so, or cannot do so, because of infirmity of body and mind, death or some other extraneous considerations? Are the beneficiaries precluded from doing so, in such circumstances? Can this Honourable Court as an arbiter of justice, estop the beneficiaries from taking the apposite steps to do so? Thus, a peculiar paraphernalia of the Court's functionality is to give souccour to the judicial ideals of justness, fairness and reasonableness, in the administration of justice. On this premise, I will thus answer the foregoing questions as follows:

1. If per adventure, the executors that should facilitate the process of vesting the testator's estate on the beneficiaries, after a will is probated, delayed in doing so, or cannot do so, because of infirmity of body and mind, death or some other extraneous considerations, the Court can appoint some other credible, reliable and responsible persons as executors, who can complete that process.
2. Even the beneficiaries, who are of age, can as well be permitted by the Court to complete the process of taking out the vesting deed from its Probate Registry.
3. This Honourable Court as an arbiter of justice, cannot under any circumstance, preclude beneficiaries from taking steps to complete the process of getting a vesting deed in respect of a probated will that meets the threshold of legal validity as espoused in 1.4.

Significantly, the above answers are framed in accordance with the legal principle that it is the sacred duty and responsibility of the Court to always give effect to, or uphold the testator's intention; and simultaneously ensure, that the interests of the beneficiaries, are certainly protected against the activities and operations of interlopers, who might undermine or threaten to undermine, such beneficial interests. Essentially, it is quite reasonable, to pontificate that the drafters of the Wills Act of 1837, inter alia had this principle in mind. Thus, on the strength of the above analysis, this Honourable Court does not succumb to the view that this is an action that is appropriate to be disposed of on a point of law. Paradoxically, Counsel for the Applicant, is desirous of this matter to be disposed of on a point of law, but he has not denied the fundamental fact, that the Plaintiffs are the undisputable beneficiaries of the devised estate of the testator (Mr. Albert Jerome Momoh).

Can this Honourable Court prevent them from taking steps to enforce their beneficial interests? The answer is certainly no. As it stands, the will which is the legal instrument upon which this action is predicated is dated 15th September 1966; and it was probated on the 29th of April 1968. This in effect means that fifty-four (54) years have lapsed since the Probate Registry of the High Court of Justice, probated the said will. And again, no fact is deponed to in either the supporting or opposing affidavit, that the will's testators are either dead or alive. So, in the circumstance, we do not know whether the vesting deed has not been taken because of death, ill-health (infirmity of body and mind) or some other extraneous considerations.

But it cannot be controverted that the beneficiaries of the will came of age long before the end of the last (twentieth) century. In fact, one of them, the 3rd Respondent, has died. Again, as it stands, we do not know whether the 3rd Respondent died testate or intestate. This fact came out clearly in Paragraph 4 of the application's opposing affidavit. In fact, Counsel for the Applicant's 2nd Order as prayed is that the 3rd Respondent, Yvonne M. Thompson was deceased subsequent to the issuance of the writ of summons and therefore cannot continue in the above capacity without substitution or continuation of her claim. Prima facie, this order as prayed appears incontrovertible, because even Paragraph 4 of the application's opposing affidavit, confirms that the 3rd Respondent is no longer a member of the human race.

However, what appears impervious to this Honourable Court is the submission from Counsel for the Applicant that Paragraph 4 of the opposing affidavit acknowledged the death of the 3rd Respondent, and no application was made for

substitution or discontinuance; therefore, the action should be disposed of. This Honourable Court cannot again accede to this submission because the provisions in Order 18 Rules 7, 9 and 18 of the HCR, 2007, are very clear on this point. Rules 7 and 9 concern the Court's unfettered power to appoint a representative of a deceased person estate and change of parties by reason of death, but Rule 18 deals with representation of a deceased person interested in proceedings. For ease of reference, and to bolster this Court's decision, in repudiating the 2nd Order as prayed, it is expedient to set out the foregoing provisions, in full:

> Rule 7: If in any cause or matter or other proceeding, it appears to the court that any deceased person who has interest in the matter has no legal representative, the Court may proceed in the absence of any person representing the estate of the deceased person or may appoint a person to represent his estate for all the purposes of the cause, matter or other proceedings on such notice to such other persons as the Court may think fit, either specially or generally by public advertisement; and the order so made and any other consequent on it shall bind the estate of the deceased in the same manner and in every respect as if a duly appointed legal representative of the deceased had been a party to the cause, matter or other proceedings.
>
> Rule 9 (1): Where a party to an action dies or becomes bankrupt but the cause or action survives the action does not abate by reason of the death or bankruptcy.
>
> Rule 9 (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in the dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.
>
> Rule 18: Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal

> representative, the Court may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased or may by order appoint a person to represent that estate for the purposes of the proceedings; and such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings

Analytically, it would appear that Rule 7, does not as a matter of strictissima juris apply to the instant case. The rule concerns deceased persons, who have no representatives, but do really have interests in cases pending before the High Court of Justice. The rule prescribes how the Court should deal with such situations. Meanwhile, it is Rule 9, that actually dovetails, with the circumstances of the instant case. Rule 9 (1) makes it abundantly clear that a subsisting action in the High Court of Justice, cannot abet because of death or bankruptcy. Rule 9 (2) undeniably encapsulates the unfettered power of the Court, to order that a deceased person's representative, can be made a party to any cause or matter; and the proceedings, can accordingly progress, as if that representative had been substituted for the deceased.

Thus, it should be noted, that in Paragraph 4 of the application's opposing affidavit, it is stated that Berthan Macauley Jnr. Esq. who is the solicitor in conduct of this matter, was still awaiting instructions, regarding whether the 3rd Respondent, died testate or intestate, so that he could take the appropriate decision. Considering the time lapse, since that affidavit was deposed to, it is reasonable to suppose that Berthan Macauley Esq., should have received whatever instructions he had been waiting for to take the next step. Nonetheless, since that next step is contingent on the determination of the pending application; and considering the aforementioned

legal issues that have been accordingly articulated and clarified, I hereby make the following orders:

1. That the 1st Order as prayed for this matter to be disposed of on a point of is accordingly denied. This is a matter that will accordingly be determined at the end of a full blown trial; for the case presented by Counsel for the Applicant (for the disposal of this matter on a point of law) is not sufficient to warrant this Honourable Court to grant the 1st order.
2. That Counsel for the Respondents is hereby ordered to make an application for the substitution of the deceased 3rd Respondent as this matter cannot be proceeded with as it is.
3. That the cost of this application shall be cost in the cause.

I so order.

The Hon. Justice Dr. Abou B. M. Binneh-Kamara, J.

Justice of Sierra Leone's Superior Court of Judicature.