Freetown
April 17,
1962

Bankole Jones
Ag.C.J.

[SUPREME COURT]

GBESSAY KEISTER . . . . . *Plaintiff/Respondent*

v.

M. S. MUSTAPHA AND A. T. BATTISON-NICOL . *Defendants/Applicants*

[C.C. 414/60]

Procedure—Motion for order to discharge order made by court on ex parte application—Motion on ground that order made per incuriam—Order obtained without notice to parties affected—Whether remedy by motion or appeal—Supreme Court Rules (*Vol. VI, Laws of Sierra Leone*, 1960), *Ord. xxiv, r.* 10; *Ord. xxxix, r.* 3.

By a judgment of the Supreme Court dated June 23, 1961, in the action *Gbessay Keister* v. *Elijah Jonathan Speck*, the plaintiff obtained specific performance of a contract for the sale of real property, and the defendant (Speck) was ordered to execute a conveyance in favour of plaintiff. Speck died on July 17 without having executed the conveyance. On July 31, Speck's solicitor wrote to the Official Administrator informing him of the death of his client and asking him to take steps to administer Speck's estate so that, as the deceased's legal representative, he could execute the conveyance of the property to plaintiff. A copy of this letter was sent to plaintiff's solicitor.

On August 25, plaintiff's solicitor applied to the Supreme Court ex parte, without notice to anyone representing Speck's estate, and obtained an order, dated September 5, for the Master and Registrar to execute the conveyance to the plaintiff. The Master and Registrar executed the conveyance on September 7, whereupon the executors of Speck's will moved the court for an order discharging the order of September 5 on the ground that it had been obtained per incuriam.

Held, granting the motion, (1) that the executors were correct in proceeding by way of motion rather than by way of appeal; and

(2) that, once the court finds that an order has been made per incuriam contrary to the rules of court, the court will not hesitate to discharge such an order, at least where no third party has been affected.

Case referred to: *Sturgeon* v. *Hooker* (1847) 2 Ph. 289; 41 E.R. 954.

Cyrus Rogers-Wright for the defendants/applicants.
Edward J. McCormack for the plaintiff/respondent.

BANKOLE JONES AG.C.J. This motion is brought by the defendants/applicants who are the executors of one Elijah Jonathan Speck (decd.), the defendant in the original action entitled "*Gbessay Keister* v. *Elijah Jonathan Speck*, C.C. 414/60, 1960, K. No. 42" for an order to discharge an order made by this court on September 5, 1961, which was obtained upon an ex parte application by the plaintiff on the ground that that order was made per incuriam and irregularly.

By judgment of this court dated June 23, 1961, in the original action, the plaintiff/respondent succeeded in obtaining specific performance of a contract for the sale of real property, and the defendant, that is, Elijah Jonathan Speck then alive, was ordered to sign and execute a conveyance of the property in question in favour of the respondent. The defendant died on July 17, 1961,

without signing and executing the conveyance. He left a will dated January 30, 1961. On July 31, 1961, the defendant's solicitor wrote to the Official Administrator, informing him of the death of his client and asking him to take steps to administer the defendant's estate in order that, as the legal personal representative of the deceased, he could execute the conveyance of the property to the plaintiff under the terms of the judgment and order of court dated June 23, 1961, and referred to above. This letter was copied to the plaintiff's solicitor, Mr. E. J. McCormack.

Now, on August 25, 1961, the plaintiff's solicitor proceeded to apply to the court without notice to the solicitor previously representing the defendant, or to any person representing his estate and obtained an order dated September 5, 1961, upon an ex parte motion for the Master and Registrar to execute the conveyance to the plaintiff with costs to be paid by the said defendant, then known to be deceased. The Master and Registrar did in fact execute the said conveyance on September 7, 1961, and paid the sum of £77 15s. 3d. as costs to the plaintiff's solicitor out of a sum of £2,000 paid into court to the credit of the deceased defendant.

Mr. Rogers-Wright submitted that it was irregular for the plaintiff's solicitor to have proceeded by way of an ex parte motion for the obtaining of the order dated September 5, 1961. He said that as these were proceedings in Chancery, the proper step for him, Mr. Rogers-Wright, now to take, was to proceed by way of motion to discharge the order and not by way of appeal. He referred me to Daniel's Chancery Practice (8th ed.), Vol. 2, at p. 1358, where it is stated as follows:

> "An order made upon motion may be discharged or varied upon motion, which should be made in the Appeal Court, unless the order was made ex parte or the application is made on the ground of irregularity."

See *Sturgeon* v. *Hooker*, 41 E.R. (Ch.) 954, in which the Lord Chancellor (Cottenham) said inter alia: "A motion to discharge an ex parte order is never considered an appeal from that order."

Mr. McCormack submitted that the defendants/applicants' remedy is by way of appeal and that their present motion should be thrown out of court because it does not purport to be a motion for the correction of clerical mistakes or errors arising from any accidental slip or omission. See our Local Rules Order XXIV, r. 10. With respect, I do not agree with him. Mr. McCormack knew that the judgment and order of this court dated June 23, 1961, did not contain an order for the Master and Registrar to sign and execute the conveyance if the defendant defaulted in doing so. He knew on the date of his application by an ex parte motion that the defendant had died and yet gave no notice of his application to anyone whatever and obtained the order sought to be discharged—an order which affected real property of a deceased person. This certainly is an irregularity and does not conform to our Order XXXIX, r. 3, which states, inter alia: "No motion shall be made without previous notice to the parties affected thereby." The rest of the rule which constitutes an exception does not apply to the present case.

Mr. McCormack further submitted that on the motion before this court, the court has no power to discharge the order of September 5, 1961, because the order has been perfected by its not only being drawn up, entered and filed, but also because the conveyance has been signed and executed. I find myself, also with respect, unable to agree with such a proposition. Once the court finds

that the rules have been flouted and that an order was made per incuriam and irregularly it will not be fettered from discharging such an order, especially where no third party has been affected. I agree with Mr. Rogers-Wright and I find that the order of this court dated September 5, 1961, was obtained per incuriam and irregularly and I accordingly discharge it.

I order that the costs of this motion be paid by the plaintiff/respondent.

Freetown
April 17,
1962

Bankole Jones
Ag.C.J.

[SUPREME COURT]

VICTOR HAKIME . . . . . *Appellant*

v.

COMMISSIONER OF POLICE . . . . . *Respondent*

[Mag. App. 11/62]

Criminal Law—Dangerous driving—Disobeying instructions of police constable—Appeal against suspension of driving licence—Magistrate's power to suspend licence—Whether necessary for magistrate to take evidence where accused pleads guilty.

Road Traffic Act (*Cap.* 132, *Laws of Sierra Leone*, 1960), *ss.* 16 (1) (*a*), 34, 41.

At about 8.30 a.m. on February 12, 1962, the accused was driving his car at a high speed along Circular Road, and, without reducing his speed, turned sharply into Pademba Road, narrowly missing some children who were crossing the street. A police officer who was on duty stopped the accused, who parked in the middle of the road. He refused to park on the side of the road as requested by the officer. After an argument, the accused was arrested and taken to the Traffic Office, where he was charged with dangerous driving and disobeying the instructions of a police officer contrary to sections 41 (1) and 34 of the Road Traffic Act.

At the trial, the accused pleaded guilty to both charges, and the prosecuting officer then stated the facts to the magistrate. The accused stated that he had driven slowly and asked for leniency. The magistrate fined the accused and also suspended his driving licence for a period of six months. The accused appealed against this decision, asking that the period of suspension be abridged. He argued (1) that the magistrate should have specified the offence with regard to which he was suspending accused's licence; (2) that the magistrate erred in failing to state the special circumstances which made it necessary for him to suspend the licence of the accused, whom the magistrate knew to be a first offender; and (3) that, before finding accused guilty of dangerous driving, the magistrate should have heard evidence of the speed at which accused was driving.

Held, dismissing the appeal, (1) that the fact that the magistrate did not specify the offence with regard to which he was suspending accused's licence did not vitiate the order of suspension;

(2) That the magistrate had no duty to state the special circumstances, if any, upon which he based his order of suspension; and

(3) That, since the accused pleaded guilty, there was no necessity for the magistrate to take evidence on the speed at which accused was driving or on any other matter before finding accused guilty.