

**IN THE HIGH COURT OF SIERRA LEONE**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**FAST TRACK COMMERCIAL COURT**

**RULING**

BETWEEN:

ASA MICROFINANCE (SL) LTD - PLAINTIFF/RESPONDENT

AND

JOSEPHINE MOSES & OTHERS - DEFENDANTS/APPLICANTS

**JUDGEMENT OF THE HONOURABLE JUSTICE M.P. MAMI J.**

**DELIVERED ON THE 22<sup>ND</sup> DAY OF 2020.**

**COUNSEL**

T.E. Bundor Esq. - For the Plaintiff

M. Koroma - For the 3<sup>rd</sup> Defendant

On file is an application by notice of motion dated 21<sup>st</sup> day of November 2019 for an on behalf of the 3<sup>rd</sup> Defendant for the reliefs:

1. That this Honourable Court strikes out and or dismissed the Writ of Summons dated 4<sup>th</sup> November 2019 on the grounds of irregularity
  - (a) That the said Writ of Summons alleging fraud/ and or theft ought to have been generally indorsed as mandated by order 6, Rules 3(g) of the High Court Rules 2007
  - (b) That this action is filed, under the wrong division of the High Court Rules 2007
2. Any further or other order (s) that this Honourable Court may deem fits and just
3. That the cost of this application be borne by the Plaintiff/Respondent

The application is supported by the affidavit of Phebian Evelyn Tarawally the 3<sup>rd</sup> Defendant herein to which he deposed to paragraphs 3-6 same been the pith and substance of her claim which is herewith repeated for ease of reference

4. "that I have been informed by my solicitors and verily believe that the said Writ of Summons was not correctly indorsed in accordance with the High Court Rules 2007 governing procedures in Court"
5. That I have been informed by my solicitors and verily believe that the Plaintiff ought to have commenced these proceedings by a generally indorsed Writ of Summons
6. That I have been informed by my Solicitors and verily believed that the Plaintiff filed the Writ of Summons in the wrong Division of the High Court.

Submissions by Counsel for the Plaintiff is premised on two (2) grounds:-

She referred the Court to exhibits "PET 3" of paragraph 11 to 15 of the said Writ of Summons. In her submissions she indicated that on an allegation that fraud or theft was committed by the Defendant, which in actual facts are particulars of fraud, it should not be contained in a Specially indorsed Writ. She further submits that once a Plaintiff pleads fraud or theft an action ought and should be initiated by a Generally indorsed Writ.

He refers the Court to Order 3 Rule 6(g) of the High Court Rules 2007, pursuant to which makes this application irregular, fatal and consequently non-compliant with the pertinent provisions of the High Court Rules 2007. Therefore the action ought to be struck out.

Her 2<sup>nd</sup> ground of objection is that the action is filed in the wrong division of the High Court. She refers the Court to Order 4 Rules 1 of the High Court Rules 2007 with reference to exhibits "PE 3", for which she cross-referenced to paragraphs 1 and 2 of the particulars of claim, and further avers that the relationship between the parties, particularly with that of the 3<sup>rd</sup> Defendant, with the Plaintiff been that of an

employee/employer relationship. Therefore Counsel on the other side is on the wrong forum, mindful also that it is not an admiralty matter of commercial nature, and or inclusive of matters as contained as so provided for in Fast Track Commercial Court Rules of 2010.

She also refers to the schedule thereof, and with leave been granted read out the lists therein.

She submitted that the irregularities are fatal and therefore non-complaint, and ought to be struck out, with substantial costs.

T.E. Bundor Counsel for the Plaintiff/Respondent in his response and in reliance on his affidavit in opposition filed on the 7<sup>th</sup> January, 2020, disagreed with submissions of Counsel for the Plaintiff and issues she raised, and contended that

- That the Writ of Summons as issued is regular and further referred the Court to Order 6 Rule 3(g) of the High Court Rules 2007 to wit:

“That Writ of Summons may at the option of the Plaintiff be specially indorsed...”

He said the use of the word “may” actually imports discretion, and in addition he says they are actually before the Court to recover monies fraudulently converted and therefore procedurally it is regular, which make them to be before the proper forum.

Under the 2<sup>nd</sup> Head of contention he submitted that they are in the right Division of the High Court on the underlying basis that:

(1). On the face of the Writ of Summons it was stamped and so registered.

He cross referenced to submissions made by Counsel for the 3<sup>rd</sup> Defendant/Applicant, in that the claim on the Writ of Summons does not fall within matter that ought to be before the Fast Track Commercial Court as contained in constitutional Instrument No. 4 of 2010, which he refuted and consequently submits that rightfully the “papers are filed before the proper forum. He further buttressed same that the Plaintiff in this matter are operating a business company, that carries out financial dealings with its customers. He further submits that all the Defendants (including the 3<sup>rd</sup> Defendant) were employees of the Plaintiff, and the issues or dispute is not that of an employer and employee as it pertains to End of Service Benefits, but about monies which they owe the company or business, for which they were employed to work. He referred to Constitutional Instrument No. 4 of 2010 hereinbefore known as the Fast Track Commercial Court Rules 20109 which he refers to 3 (g) of same which gives the generic ground “any other commercial dealings” as it covers all such issues. In summary he noted that their Writ of Summons was so properly endorsed and issued, and they were in the proper forum.

## **ANALYSIS OF THE LAW**

It is but pertinent to state out clearly the Law on endorsement of a Writ of Summons as is provided for in Order 6 Rules (3) of the High Court Rules of 2007, which states when same is to be utilized:-

“In action where the Plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising”

It lists out as it sets out from (a) to (g), 7 (seven) circumstances in which the Writ of Summons may be endorsed with a statement of the nature of the claim, save for (g) in which there is a ‘but for’ caveat to wit:

“In all other actions in the Court except actions for libel slander, malicious prosecution, seduction, breach of promise of marriage, and actions in which fraud is alleged by the Plaintiff.”

And same is continuous:

“The Writ of Summons may (emphasis mine), at the option of the Plaintiff be specially indorsed with or accompanied by a statement of his claim or the remedy or relief which he claims to be entitled.

The use of the word “May” for Counsel for the Plaintiff/Respondent imports a reinforced view of discretion, which is further qualified with the phrase “at the option of the Plaintiff” and so qualifies the word “May”, for which an alternative course could be adopted if and when the circumstances so demand.

Before a writ is issued pursuant to Order 5 Rule (2) of the High Court Rules 2007, it must be indorsed either with a full statement of the Plaintiff’s claim (formerly called a “special indorsement”) to which all the rules of pleadings apply, or with a concise statement of the nature of the claim made.

The argument of Counsel for the Defendant/Applicant is that fraud is alleged by the Plaintiff against employees of the company (the Defendants) for loans given out to their customers, upon which during the course of routine checks, they discovered that a Sum of Le 242,553,000.00 (Two Hundred and Forty-two Million Five Hundred and Fifty-three Thousand Leones). This includes loans that were not paid in the company’s account, and the total cost of the office items carted away. He reaffirms that the issues are claims of a commercial nature and therefore ought to be adjudicated in the Fast Track Commercial Court Division of the High Court, pursuant to the Fast Track Commercial Court Rules of 2010.

This Court is quick to point out that in furtherance to the aforesaid Rules, a commercial claim is a claim arising out of trade and commerce, including claims relating to formation or governance of a business or commercial organisation,

restructuring or payment of commercial debts by or to a business commercial organisation or person, a business commercial debts by or to a business commercial organisation or person, a business document or contract, export or import of goods, carriage of oil, sea, air, land or pipeline, explorations of oil and gas reserves insurance and reinsurance, banking or financial services, business agency, disputes involving commercial arbitration and other settlement awards, intellectual property rights, including patents, copy rights and trademarks, tax matter, commercial fraud, application under companies Act, and claims of commercial nature.

The pith, thrust and gravamen of Order 6 Rules 3 of the High Court Rules 2007 is “where the Plaintiff seeks to recover a debt (emphasis mine)

Certainly the particulars of claim as encapsulated in paragraphs 1,2, and 3 of the particulars of claim thereof is not one of debt for which I will repeat the said particulars of claim for ease of reference to wit:

Paragraph 1 - “that 1<sup>st</sup> Plaintiff is and was at all material times to this action a private limited liability company registered in Sierra Leone pursuant to the companies Act No. 5 of 2009, and the 2<sup>nd</sup> Plaintiff is and was at all material times to this action an employee of the company”

Paragraph 2 - “the Defendants are and were at all material times to this action employees; as Branch Manager and loan officers respectively of the 1<sup>st</sup> Plaintiff

Paragraph 3 - “sometimes in July 2019 the Plaintiff visited the branch office at Malama, Lumley where all the Defendants were stationed in a bid to making a routine check for reports and record purposes.

Paragraph 4 - “the plaintiffs during their normal routine checks for record purposes discovered that a sum of Le 242, 553,000.00 (Two Hundred and Forty-two Million Leones Five Hundred and Fifty-three Leones) which included, the loans collected that were not paid in the company account and the total cost of the office items carted away by the Defendants”

The particularity hereinbefore repeated sets out in clear terms the relationship between the Plaintiff and the Defendants as that of an employer/employee relationship albeit for a claim of fraudulent conversion, which does not however preclude the Plaintiff/Respondent from instituting Criminal/Civil action as they so deemed fit, but certainly not one anticipated by the drafters and framers of the Fast Track Commercial Court Rules of 2010. I must reiterate it is not one for recovery of debt, and in furtherance to Order 3 Rules 6 of the High Court Rules 2007 for which the options listed thereat should have been exercised as so submitted by Counsel for the Plaintiff/Applicant, as it does not arise in the circumstances at all. This is further reinforced as so clearly shown that the transaction as so particularized or claimed, does not fall within commercial claims which ought to have arisen out of trade and

commerce in tandem with the Rules, nor does it fall within the claims as provided for in Section 3 (a) to (v) of the said Rules.

The submissions of Counsel for the Plaintiff/Applicant are tenable, consequent upon the aforesaid, this Court orders as follows:-

- 1. That the Writ of Summons FTCC 254/19 2019 No.16 is hereby struck out for the several procedural irregularities as so contained therein.**
- 2. No order as to costs.**

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**THE HONOURABLE JUSTICE M.P. MAMI J.**