Civ. App. 52/2022

IN THE COURT OF APPEAL OF SIERRA LEONE

Between

Benjamin Juxon- Smith - **APPELLANT**

v.

Vincent Lamin Kanu Jnr. - **RESPONDENT**
(Administrator of the Estate of Vincent Kanu Deceased)

Coram: *Justice Abdulai M. Bangura JSC (Presiding)*
Justice Reginald Sydney Fynn JA
Justice Michael P. Mami JA

Representation: **Gbatundu Kutubu Esq** for the Plaintiff
Lambert & Partners for the Respondent

Judgment dated 14th July 2026

FYNN JA

Background

1. This appeal comes to us after a successful application made pursuant to Order 17 of the High Court Rules 2007. The Respondent/Defendant being dissatisfied and maintaining that the matter was unsuitable for disposition under O17 has now appealed to us.
2. The action was first instituted by writ of summons in which the plaintiff, who is suing as the Administrator of the Estate of one Vincent Kanu, is asking the court amongst other things, for a declaration that property situate at Sir Samuel Lewis Road (the disputed property) forms part of the Estate of the said Vincent Kanu. The Defendant filed a statement of defence and Counter claim. The defendant claims in his defense that "by

virtue of an arrangement with the late Vincent Kanu" he was entitled to have the ownership of the disputed property transferred to him.

3. The Plaintiff by Judge's Summons then approached the court to decide the matter on a point of Law. The plaintiff posed three questions as follows:

   "Whether as a matter of law:

   i. *The Statement of Defence filed by the Defendant raises/constitute a valid defence in law to the claims of the Plaintiff contained in the writ of summons in this action*
   ii. *The Counterclaim made by the Defendant against the Plaintiff is valid and enforceable against the plaintiff and*
   iii. *The several agreements mentioned in the statement of defence and counterclaim are void and/or unenforceable*

   In light of and/or for the construction of the provisions of the Registration of Instruments Act CAP 256 of the Laws of Sierra Leone 1960(as amended) and or the Statute of Frauds 1677.

4. The Learned Trial Judge (LTJ) proceeded to answer the questions posed. In its answer the Court declared that the plaintiff as Administrator of the Estate of Vincent Kanu is entitled to the immediate possession of the disputed property as it is part of the estate of Vincent Kanu. The defendant now appellant does not agree.

The Appeal

5. The Appeal is set out under eight grounds. These however can be distilled into two main issues as follows: Firstly, that the LTJ "proceeded to consider and give judgment under order 17 when issues of fact are interwoven with issues of law". The appellant contends that the matter was not suitable for determination under O17 of the High Court Rules. Secondly, that the LTJ relied on hearsay evidence which at best ought to have been presented in a proper trial by the appropriate witness (es).

6. <u>The Appellant's Submissions:</u> The appellant had filed written submissions on which he relied. Counsel for the appellant made oral submissions on his grounds 1, 3 and 4 conjointly as these share the concern of failure to recognize that there are factual issues interwoven with legal issues thereby making the case unsuitable for determination under O17. Counsel urged that by dealing with the single legal issue as the LTJ did, the

LTJ now left unanswered several important issues. Counsel submitted that by adopting that process the court was deprived from fully appreciating the uniqueness of the case resulting in a finding that ignored crucial and germane factors.

7. The appellant concedes that the absence of a written agreement would generally undermine ownership claims such as the one advanced by the appellant. He submits however, that the want of a written agreement is curable by relevant evidence of the existence of a parol contract. He argues that the appellant has witnesses such as would testify to the existence of the oral agreement between the deceased and the appellant. He submits further that a resort to O17 has stifled the production of such curative evidence as the process does not make room for the testimony of the witnesses.
8. Referencing his grounds 5 & 6 the appellant's counsel submits that the LTJ failed to recognize the exceptions to the Statute of Frauds 1677. One of these exceptions, the appellant argues, should apply to his present situation. He submits that the doctrine of part performance and or promissory estoppel being exceptions to the strict rules provisions of the statute would, in a full blown trial have cured the parol agreement's short comings.
9. The appellant also submits that the LTJ had relied too heavily on the affidavit of the Plaintiff (now respondent) contending that the contents of that affidavit could have formed the basis of a witness statement or even testimony in a trial.
10. The Respondent's Submissions: The respondent also filed written submissions on which he relied. The respondent's counsel maintained that the appeal is devoid of merit. He submits that the case is pretty straightforward. H argues that there is no evidence of an agreement relating to the disputed property. He also argues that the alleged reference to friends who knew about the agreement is vague with no names being mentioned. He submits that also there is no evidence of the alleged mechanical services given nor any relating to the alleged improvements on the land which could have been made for the tenant's convenience considering his prolong occupancy.
11. He argues that the matter is suitable for determination under O17. All the criteria for suitability he says have been met and he maintains that the facts in dispute do not affect in anyway the question of law raised. He argues that the basic question posed is whether land can be transferred orally in Sierra Leone.
12. The respondent further submits that the Supreme Court has interpreted S2 of the Registration of Instruments Act as amended; he argues that the ratio in Abdulai Sesay v Emad Bahsoon SC Civ. App No. 6/2005 binds this court.

Deliberations

13. The parties do not appear to be at variance with respect to the law governing O17 applications. This court's ruling in Betty Mansaray v. Kamara-Williams Misc App 4/2004 has been cited and we accept that it does set out a viable guide on the use and applicability of O17. When a court considers an application to decide a case on a point of law it is crucial that the court first tests and answers the question on whether the case is suitable for determination pursuant to O17.

14. A Judge who has been invited to decide a case on a point of law must first come to a conclusion as to whether the case is suitable to be decided on a point of law. Such suitability it has been shown depends greatly on whether the question posed when answered will leave the whole of the issues settled. Korso Finance Establishment Anstalt v John Wedge (*unreported, see Supreme Court Practice 1999*) was cited to make the point that if issues remain unresolved after answering the question posed then the case cannot be one suitable for determination under order 17. It also supports a position that a construction question is suitable for determination if ~~was~~ it would resolve all the issues in the case.

15. In the Betty Mansaray case the opinion was clear that when facts are contested it would usually be unsafe to decide a matter pursuant to O17. The court posed the question: *"To what will the law be applied?"* It is important to clarify that this should not be taken to mean that any given set of facts raised by a party which are disputed by the other would immediately lead to unsuitability. Read carefully the opinion was that facts should be interwoven with the legal issue (see State v Bank of India v Murjani Marketing 1991). Where the disputed facts can stand separate from the legal issue to be decided, as where it is but a question of construction of a statute, then suitability may not compromised.

16. In Margai v. Seray Wurie (Unreported) the court was of the opinion that *"the case is replete with many contentious factual issues. Many of these contentious issues need to be resolved first before the legal issues which were raised for determination can be clearly addressed"*. The court found there that if the 'contentious factual issues' were not first resolved a clear application of any legal determination was not possible. This should not be read to mean that any factual disagreement makes a case unsuitable for order 27. Any other interpretation would lead to the absurd position that a party who is

against a Judge deciding a case on a point of law need only raise contentious facts, however spurious and unconnected to successfully defeat the application. The court holds that the contentious facts required should be much more, they must be so interwoven with the legal issues that the latter cannot be decided without the previous resolution of the former.

17. The contentious facts which have been put forward in the present case relate mainly to the following issues, i) there is an oral agreement, with witnesses to prove it ii) the appellant developed the land relying on this agreement and iii) the appellant also gave the motor mechanic services to the land owner as part consideration for the land. The appellant asserts all these facts and insists he can prove them with evidence at trial. The respondent denies them all. Will the proof of these facts one way or the other affect the resolution of the legal question, of construction, that has been raised for determination? This is the crucial question to which we will return later.

18. The Statute of Frauds 1677 has been referenced by the parties. The statute is clear in its demand that agreements which relate to the sale and or transfer of interests in land must be evidenced in writing. The statute provides that when such agreements are not evidenced in writing they immediately become "voidable" or "unenforceable". However, the statute also provides a way out of this difficulty. It does so through part-performance and the equitable doctrine of promissory estoppel. A party relying on the doctrine of part performance has to show that the acts relied on as part performed are directly referable to the alleged contract.

19. The test for part performance such as would bring an agreement outside of the Statute of Frauds is found in Maddison v Alderson 1883 AC467. The principle set out there is still good today (see Steadman v. Steadman 1996 UHKHL 18 AC 536). The acts alleged to be part performance should be unequivocally referable to the contract. The alleged act should not be capable of any other explanation save that it was done in furtherance of the contract. In Conteh v. Conteh (unreported) as well as in Sesay v. Bangura 1975 SLHC both though decided below show how this principle has being used in our jurisdiction.

20. Is the present case one that sits within the scope of the Statute of Frauds of 1677? If it is would the alleged acts of consideration be such as would suffice as part performance? And significantly would the LTJ have been able without a trial to decide on whether in fact there had been part performance such as would defeat the provisions of the statute.

21. In Sesay v. Bahsoon, heavily relied on by the parties, the Supreme Court pointed out that *"the issue of part performance had been unnecessarily drawn into the controversy"*. The court also expressed the opinion that *"the doctrine of part performance has no relevance in this case as the defence in both the claim and counter claim are not based on the statute of fraud."* The Court further clarified that *"the present case clearly does not fall into what can be regarded as the Statute of Fraud cases"*. I have to point this out to make it clear that much of the reliance on this case as far as it mentions the Statute of Frauds is but obiter dicta and with no binding effect.

22. In the present case however, the Statute of Fraud is in fact relevant as the questions posed mentions the statute specifically. The LTJ was called upon to answer the questions posed in the context of the statute. Significantly, the statute provides as has been mentioned that to avoid its strict application there should be shown evidence of part performance. It would follow therefore that a defendant objecting to an Order 17 application and relying on a part performance defence has a duty to clearly demonstrate that he is not merely mentioning the statute and using part performance as a red herring. There must be a lot more to it.

23. The LTJ did not go further to discuss these matters of part performance which the appellant sought to raise. The LTJ did not do so because the defendant had failed to state *"...in his pleadings or affidavits when he had the agreement with Vincent Lamin Kanu."* The LTJ further stated that *"This is germane and should have been set out for the consideration of the Court"*. The LTJ was also concerned that the appellant then defendant respondent had *"not in any way named any of his witnesses he intends to call to substantiate his defence ...and counterclaim"*

24. The acts of part performance which the appellant intends to rely on include the building of a fence and the alleged servicing of vehicles. There was nothing before the LTJ nor was there anything before us to show that these activities could have been referable specifically to a land sale agreement. A mechanic servicing his landlord's car cannot without more than the mechanics word be said to be paying for the land he occupies. Similarly it is not uncommon for tenants to make improvements to the rented premises without such improvements being part of a purchase price. The case of Chaproniere v Lambert (1917) 2Ch 359, cited favorably in Ibrahim v. Solomon 1950-56 ALR SL 331 refers. The LTJ was correct to have expected more than the word of the appellant to elevate those actions to more than mere words.

25. In an application for Judgment under order 17 the parties are expected to bring forth all their evidence. This would ordinarily give the Judge the opportunity to properly assess such evidence and decide whether it crosses the threshold so as to conclude whether there are disputed facts that need to be resolved in a full blown trial. It should be remembered that a successful application leads to final judgment. Sir Thomas Bingham's caveat is very instructive here:

> *"But if after argument the Court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts are, the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be allowed to prolong the proceedings..."* (See Para 14A/2/5 Supreme Court Practice 1999 page 200)

26. The Defendant/Appellant is expected to have put his best foot forward and should not be found hoping to go in search for evidence which will be used later in a trial. It must be reckoned that exhibited in its affidavit in-opposition was the defendant's case at its best. The defence case relies, first on an oral contract and second, on part performance, both of which are denied. Regrettably not much evidence, if at all, has been brought in opposition of the application to establish or bolster the existence of neither the contract nor the part performance. There is no indication as to when this contract was made, who was/were present, what was the agreed consideration- how many vehicles should be repaired/serviced, to what value of service/repair, for what period, was the consideration fully transferred before the demise of Vincent Kanu, if it was not, what portion was left? An effective defence should have raised these answers or given clear pointers towards them.

27. In the absence of evidence pointing towards part performance of consideration will an oral contract for the sale of land be enforceable considering the Statute of Fraud? The answer has to be a "no". We would hold that the LTJ was correct in finding as she had- even as she posed the question in her analysis that "the more important issue is whether the Defendant's case can be substantiated at all?" This was not merely a pointer to the failure to bring sufficient evidence to undermine the suitability of the case. This was more of an indication that the Statute of Fraud aside which would need evidence to show part performance the LTJ was inferring that there is no evidence that could possibly be brought later to cure the difficulty posed by the Registration of Instruments Act.

28. Section 2 of the Registration of Instruments Act 1964 as amended is also referenced for construction in the questions posed to be decided. The section renders void any contract for land which is not registered within a specified time line. This statue itself offers respite from its strict provisions. Courts are given the power to order registration out of time of any contract that may have been caught by the time lines laid down by the statute.
29. The parties have on occasion mentioned the Statute of Fraud and The Registration of Instruments Act in a rather interchangeable manner. Treating them as if one is the realization of the other and as if they i.e. the statutes, both have the same requirements. This is not a correct approach as the two statutes are in fact separate and distinct. Each one of them would need to be complied with failing which a party must bear the consequences that may follow any noncompliance.
30. Justice Semenga Janneh JSC sounds this caution in the Bahsoon Case when he first observed that there was an attempt *"to extend and apply (the) principles enunciated in respect of the Statute of Frauds"* on the one hand to the Registration of Instruments Act 1964 (as amended) on the other hand. The Honourable Justice cautioned that:

> *"a notable distinction between the relevant provisions of the Statute of Frauds and Section 2 of the Registration of Instruments Act is that the provisions of the Statute of Fraud merely make the agreement unenforceable...in this situation it continues to subsist....On the other hand as regards S.2 of the Registration of instruments Act 1964 failure to register the document (agreement) within the relevant period renders the agreement void as opposed to voidable or unenforceable"*

The Honorable Justice continued and opined that such an agreement, that is one which has not been registered, within the provided time frames, is *"dead for all practical purposes, non-existent"*.

31. This distinction between these two statutes is very important. It crucially points out that even if evidence were brought to establish that there was a contract for the sale of the land to the appellant, that would be but one hurdle. A more challenging hurdle would be the requirement for the registration of every contract for the transfer of land. The latter statute causes such a failure to render a contract void. The effect of an agreement being void due to failure to register pursuant to the Registration of Instruments Act (1964) as

amended is clear. It does not need to be given further attention except to reiterate the words of Justice Semenga Jammeh JSC which binds this and all courts in the jurisdiction:

> *"...immediately after the stipulated period for registration Exhibit A became not voidable or unenforceable but dead; for all practical purposes, nonexistent."*

32. The only remedy for the consequence of the failure to register an agreement within the stipulated time would be an order from a competent court permitting the registration of the agreement out of time. This remedy is provided for in section 2 of the Registration of Instruments Act (1964) itself, to wit;

> *"Provided that any person prejudiced by the* ***avoidance of any transaction*** *under the provisions of this subsection may apply ...to a Judge...for permission to register after the expiration of the period limited for registration.."* (Emphasis mine)

33. There is however, in this case, no alleged attempt to save this transaction using this remedy or at all. The question then that looms before us is; How then, can the appellant enforce a 'transaction'/contract (if there is one) for the sale of land which contract is not registered? Can the principles of equity which would save a contract under the Statute of Frauds be extended to save one under the Registration of Instruments Act? If so, on what authority?

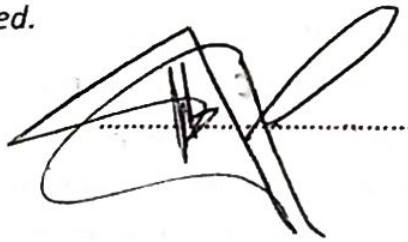
34. The Court notes that the Statute of Frauds 1666 makes specific respite possibilities from its own strict provisions. The Appellant has submitted as if those provisions are in fact also automatically available under the Registration of Instruments Act 1964. However, as already set out above, the Supreme Court of Sierra Leone has construed S. 2 of the latter Act, and has decided that Courts lack the power to revive such an agreement, ie one made void by failure to register on time. It is against this backdrop that the LTJ had stated *"But the more important question is whether the Defendant's case can be substantiated at all"*. This Court holds that the defendant's case could not be substantiated at all – he had neither a registered agreement nor an order to register one out of time. This should not be confused with situations where a defence can in fact be substantiated as was possible in The Trustees of the Nigeria Railway Corporation Pensions Fund v. Aina 1970 LPELR 323 (SC).

35. The Court has found it unnecessary to address in this judgment some of the other issues counsel raised in their submissions. Examples of these are those touching i) hearsay, ii) the alleged testamentary notes of the deceased nor, iii) the danger of entertaining

allegations against a deceased person, who cannot give his side of the story. The Court is content that the issues which have been raised and discussed herein are quite sufficient to reach a just conclusion of this appeal.

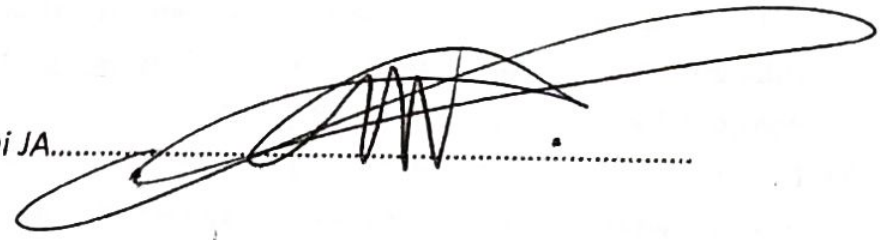
36. In view of the fore going deliberations this Court holds that the LTJ was not in error in her assessment of the suitability of deciding the matter on a point of law. This Court holds further that the LTJ was also right in her application of the law to the questions posed and that her answers to those questions were correct. The court finds no reason to disturb the orders made below and now decides therefore as follows:

    i. *That this appeal is dismissed in its entirety.*
    ii. *That the property situate lying and being at Sir Samuel Lewis Road, Aberdeen subject matter of this action is hereby declared to form part of the Estate of Vincent Kanu (deceased)*
    iii. *That the respondent as Administrator of the Estate of Vincent Kanu (deceased) shall have immediate possession of property situate lying and being at Sir Samuel Lewis Road, Aberdeen the same which is subject matter of this action*
    iv. *That the Respondent shall have the Costs of this Appeal as well as those below. Such costs are to be agreed by the parties failing which same shall be taxed.*



.....Justice Reginald Sydney Fynn JA

Justice Abdulai M. Bangura JSC (Presiding).....



Justice Michael P. Mami JA.....