C.C 12/20 2020 D. N0.2

In the High Court of Sierra Leone

(Land, Property and Environmental Division)

Between:

Haja Fanta Daramy

(Suing by Her Attorney Mariama Kondeh) - Plaintiff

And

Emmanuel Sanko Sawyer and Others - Defendants

Counsel:

A.B. D. Bangura Esq. C. Campbell Esq. for the Plaintiff

E. T. Koroma Esq for the 1st and 2nd Defendants

P. Fofana Esq. for the 4th and 5th Defendants

G. Conteh Esq. for the 7th Defendant

Ruling on an Application to Strike Out the Affidavit Evidence of a Deponent for an Alleged Contravention of Order 31 Rule 8 of the High Court Rules 2007, Constitutional Instrument N0.8 of 2007, Delivered by The Hon. Dr. Justice Abou B. M. Binneh-Kamara, on Thursday, 28th July 2022.

1.1 Introduction

This Honourable Court, on Tuesday 3rd March 2020, made an interim injunctive order, restraining the Defendants whether in themselves, their agents, servants, privies or howsoever called from otherwise interfering, entering, and/or remaining upon the Plaintiff's property, situate lying and being at Peninsular-Circular Road Sussex, Freetown and delineated on Survey Plan LS 4035/86 dated 22nd December 1986, pending the hearing and determination of the other orders in the same application. Thus, the other orders prayed for in that application are interlocutory

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injunction and cost. Since the application was made ex parte (without Counsel on the other side knowing that such application had been made), this Honourable Court, in its wisdom thought that it was rationally expedient and judicious, to make an order for an interim injunction, to be served on the respective Counsel on the other side, so that they can advise their clients to desist from having anything to do with the realty (the subject matter of this litigation) and simultaneously indicate their willingness to contest the application, by filing the apposite affidavits in oppositions to the application's bolstering affidavit.

Further, same was done and Counsel for the 1st and 2nd Defendants (E.T. Koroma Esq.) filed an application to cross-examine the deponent (Mariama Kondeh) on the facts deponed to in her affidavit supporting the application. This Honourable Court granted the application, and a rigorous and marathon cross-examination was done. Eventually, E.T. Koroma Esq., applied for the facts deponed to in that affidavit, to be expunged from the Court's records, because they are of no evidential value. Counsel noted that the very facts in that affidavit were deponed to in contradistinction to the provision of Order 31 Rule 8 of the High Court Rules 2007, Constitutional Instrument N0. 8 of 2007 (hereinafter referred to as the HCR, 2007). He furthers that the deponent confirmed under cross-examination that, the affidavit was signed in the office of her solicitor and that the face of that important legal document, depicts that it was signed at the Law Court Building, Siaka Stevens Street, Freetown.

Contrariwise, Counsel for the Plaintiff (A. B. D. Bangura Esq.), contends that Counsel on the other side's argument is misleading, noting that the latter confused the use of the word 'signed' to mean 'sworn', as used in Order 31 Rule 8 of the HCR 2007. Counsel stresses that to say that the deponent's supporting affidavit was 'signed' in his office, does not presuppose that it was 'sworn' to in his office. Alternatively, he relies on the provision of Order 31 Rule 4 of the HCR 2007 and craves this Honourable Court's indulgence to dismiss the application with cost. In reply, E.T. Koroma Esq. contends that an affidavit cannot be sworn to, if it is not signed; adding that it must be signed before a Commissioner of Oaths and that the allusion to Order 31 Rule 4 of the HCR 2007, is far-fetched and therefore has

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nothing to do with the application to expunge the doubtful affidavit, from the records.

1.2 The Analysis

The central idea that is germane to the argumentations of both Counsel is about the admissibility of the affidavit evidence of the deponent to the supporting affidavit of the application for interim and interlocutory injunctions and cost, made on the 27th February 2020. A general rule of adjectival law, that is clearly discernible in most of the provisions of the sixty-two (62) Orders of the HCR 2007, concerns the relevance and admissibility of affidavit's evidence, in particularly interlocutory proceedings. Order 30 generically touches and concerns, the rules relating to the relevance and admissibility of evidence at trial. That Order is silent on affidavit evidence. Affidavit's evidence is the structural architecture on which interlocutory applications are built. Thus, interlocutory applications, whether they are made by notices of motions or summonses, must be bolstered by the apposite affidavits, sworn to by their respective affiants, who might not necessarily be the actual parties to a litigation. This same rule also applies to affidavits in opposition.

Thus, affidavits are meant to present the facts and facts-in-issue, that guide the courts to determine, whether specific interlocutory applications, should or should not be granted. However, it is the subsequent Order to Order 30 of the HCR 2007 (Order 31), that clearly deals with affidavit evidence. Order 31 Rule 1 states the forms that affidavits shall take. Sub-rule 4 of same makes it very clear that affidavits shall be expressed in the first person, and unless the court otherwise directs, shall state the place of the residence of the deponents and their occupation, or if they have none, their descriptions etc. In the circumstance wherein deponents deponed to them in a business or professional capacity, the affidavits may state their places of business and professional operations and the positions they hold in their institutions or entities (see sub-rule 5).

Moreover, affidavits shall be in a book form and shall be accordingly consecutively numbered. Their facts shall be sequentially presented in paragraphs and each of

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their paragraphs, shall contain different ideas, about the facts and facts- in-issue as presented.

The dates, sums and other numbers in affidavits, shall be expressed in figures and not in words. Thus, they shall be signed by their deponents and their jurats shall be completed and signed by the persons before whom they are sworn (see sub-rules 6, 7, 8 and 9). Rules 2, 3, 4 and 5 deal with affidavits by two or more deponents, affidavits of illiterates or blind persons, use of defective affidavits and contents of affidavits. Further, Rule 6 empowers the High Court of Justice to strike out scandalous, irrelevant and oppressive contents from affidavits. Rules 7, 8, 9 and 10 concern, issues relative to alterations in affidavits, affidavits not to be sworn before solicitors, filing of affidavits and use of original affidavits or office copies. Meanwhile, whereas Rule 11 relates to the need to exhibit (and not to merely attach) documents to be used in conjunction with affidavits to affidavits; Rule 12 deals with affidavits sworn to in other jurisdictions.

The foregoing is a clear depiction of the rules relating to affidavit's evidence in interlocutory proceedings. The application to be determined, is whether an affidavit signed before a solicitor, should be maintained in the records or struck out, based on procedural irregularity. Indeed, the authenticity of the very affidavit, which is being contested, was signed before the Plaintiff's solicitor. And Counsel for the 1st and 2nd Respondents, objected to the admissibility of that affidavit. It was that objection that culminated in the application of the deponent to be cross-examined on the facts deposed to in that affidavit. Counsel in opposing the admissibility of that affidavit, climaxed his application with the provision in Order 31 Rule 8 of the HCR 2007. The provision thus reads:

> **'No affidavit shall be acceptable if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that solicitor'**

Thus, it is against the backdrop of the foregoing provision, that Counsel thinks this Honourable Court is compelled, to strike out the said affidavit with cost. Essentially, it would seem, that the court is compelled at this stage, to struck out or expurgate, the affidavit at once, but a reasonable tribunal of facts, is obliged to unpick the

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opposing argument of the other side's Counsel, juxtapose both and examine that which holds sway, in the context of the rule of adjectival evidence as enunciated above. The argument, mounted by the Applicant's Counsel, that the 1st and 2nd Respondents Counsel, misconstrued or misunderstood the provision in Order 31 Rule 8 of the HCR 2007, is untenable and hence unacceptable. That submission is guilty of a naïve procedural miscalculation. Even though neither the Applicant nor Respondent's Counsel alludes to Sub-rule 9 of the HCR 2007, this Bench's construction of the provision is that it affirms the opposition to the admissibility of the said affidavit evidence and the need for it to be expunged from this Honourable Court's records. The provision thus reads:

> **'Every affidavit shall be signed by the deponent and the jurat shall be completed and signed by the person before whom it is sworn'.**

Therefore, to say, as Counsel for the Plaintiff does, that his colleague misunderstood the provision, by confusing the word 'signed' with 'sworn'**,** as used in Order 31 Rule 8, is an exercise in semantics, that is unhelpful to this Honourable Court. Thus, the semantic values of the words 'signed' and 'sworn' are quite denotatively different. Even in the contextual or connotative sense, as used in Order 31 Rules 1 (9) and 8, they are as well different. In fact, the word 'signed' is not to be found in Rule 8; it is Rule 1 (9) that contains the words 'signed' and 'sworn'. And this latter rule was not referenced by either Counsel in their submissions. Thus, the Sub-rule makes it mandatory and not directory (using the auxiliary verb 'shall' in the provision) for the affidavit to be signed by the deponent and that the jurat *shall* be completed and *signed* by the person before whom it is *sworn* (The emphasis is on the underlined words).

Nonetheless, what really mesmerizes this Bench the most, is the ingenuity manifested by the framers of the rules. The extent to which a court of competent jurisdiction is empowered by the rules in the interest of justice, fairness and reasonableness, to admit an affidavit in evidence, even in its defective form. Order 31 Rule 4 of the HCR 2007, thus states:

> **'The court may receive an affidavit sworn for the purpose of being used in the cause of a matter, notwithstanding any defect by misdescription of**

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parties or otherwise in the title or jurat or any other irregularity in its form; and may direct a memorandum to be made on the document that it has been so used'.

The above provision dovetails with Paragraph 41/4 of the English 1999 Annual Practice. The paragraph thus reads: 'An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. And the effect of the rule in paragraph 41/4 above, as enunciated in Paragraph 41/4/1 is cognate with the provision of 0rder 31 Rule 4 of the HCR 2007 and what I have already stated above about the brilliance and ingenuity of the drafters of the rules, in upholding the ideals of justice. This does not presuppose that the rules are not meant to be upheld; neither are they meant to be circumvented. In fact, the rules are really meant to be upheld and not to be circumvented, but in the circumstance wherein any rule of procedure may defeat the ends of justice, that procedural rule will never be allowed to foreshadow and defeat the ends of justice. This is in essence the principal thrust of the provision in Order 2 Rule 1 of the HCR 2007, concerning non-compliance with the rules.

The provision thus reads:

Where, in the beginning or purporting to begin of any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of the Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, Judgment or order in therein.

In view of the foregoing analysis and the fact that Counsel for the Plaintiff, alludes to the provision in Order 31 Rule 4 of the HCR 2007, in craving the Court's indulgence, not to expunge the Applicant's affidavit of 3rd February 2020, from the Court's records, I rule that the said affidavit is hereby admitted in its defective form; and hereby also directs that a memorandum is to be made on the document

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(affidavit) that it has been so used. The respective parties to bear their own cost of the application. I so order.

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

Justice of Sierra Leone's Superior Court of Judicature.

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