MISC. 98 2020 S. N0. 69

In the High Court of Sierra Leone

(Land, Property and Environmental Division)

Between:

Mr. Mohamed Sesay - 1st Plaintiff/Applicant

Madina Community

Back of Cockrill

Off Wilkinson Road

Freetown

Hannah Williams - 2nd Plaintiff/Applicant

Madina Community

Back of Cockrill

Off Wilkinson Road

Freetown

And

Mayanie Sesay - Defendant/Respondent

22 Thompson Bay

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Off Wilkinson Road

Freetown

Counsel: A. Boyzie Kamara Esq., J. T. Mansaray Esq. for the Plaintiff/Applicant

S. A. Conteh Esq. for the Defendant/Respondent

Ruling on a Preliminary Objection, concerning an Application for a Stay of Execution and All Subsequent Proceedings in the Magistrate Court; an Order to Set Aside Magistrate's Cowan Orders of 1st July 2019 and 10th February 2020; and an Order for a Declaration that the 1st Plaintiff/Applicant is the Lawful Lessee, entitled to Possession and Occupation of the Property Situate, Lying and being, at the Back of Cockrill, Off Wilkinson Road, Freetown.

1.1 Introduction

This ruling is contingent on a preliminary objection, raised by S. A. Conteh Esq. on behalf of the Defendant/Respondent (Mayanie Sesay) on 24th March, 2020. The objection was accordingly raised, immediately after A. Boyzie Kamara Esq., had moved this Honourable Court, on the contents of a notice of motion (dated 13th February 2020) and supported by the affidavit of one John T. Mansaray Esq., a then Pupil Barrister, attached to the Law Firm of Fornah-Sesay, Cummings, Showers and Co., sworn to and dated 13th February, 2020. The said notice of motion prays for the following orders:

1. That this Honourable Court grants a stay of execution of the Order of Magistrate Cowan (deceased) of 10th February 2020, and all subsequent proceedings, pending the hearing and determination of this application.

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2. That the orders of Magistrate Cowan, dated 1st July 2019 and 10th February 2020 respectively, be set aside.
3. That the 1st Plaintiff/Applicant, whose name appear on a Letter of Offer, dated 16th January 2019 and a survey plan marked LOA 12568, dated 17th October 2019, as property leased to him by the Ministry of Lands, Housing and Country Planning, on behalf of the Government of Sierra Leone, be declared to be the lawful lessee and person entitled to possession and occupation of the property situate, lying and being at the Back of Cockrill, Off Wilkinson Road, Freetown.
4. Any further or other orders that this Honourable Court deems fit and just in the circumstance.
5. That the cost of this application be borne by the Defendant/Respondent.

1.2 <u>The Preliminary Objection and the Response thereto</u>

The preliminary objection is predicated on a jurisdictional concern. The High Court of Justice of the Republic of Sierra Leone, only presides over matters that are brought to it, pursuant to the provision in Order 5 Rule 1 of the High Court Rules, Constitutional Instrument N0.8 of 2007 (hereinafter referred to as the HCR, 2007). The said provision makes it quite clear that actions in the High Court of Justice are begun by originating notices of motion, originating summonses, petitions and writ of summonses. Contrary to this provision, this action is said to be wrongly before this Honourable Court, pursuant to a notice of motion (which is not one of the ways, by which an action can be initiated in the High Court of Justice). Thus, S. A. Conteh Esq. argued that this irregularity is so fatal that it cannot be cured; noting that it is neither a typographical error nor a mistake.

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Counsel furthered that the Master and Registrar of the High Court of Justice and the Deputy Assistant Registrar of the Magistrate Court, should not have been copied in that application; though he did not articulate the reason why, this should not have been done. Meanwhile, Counsel also submitted that even the affidavit, supporting the application is defective on several points. First, it is devoid of the year, the letter and number as is requested. Secondly, it is not accordingly numbered; as required by Order 31 Rule 1 (6) of the HCR, 2007. Thirdly, it is contrary to the provision of Order 31 Rule 9 (1) of same, as it does not indicate the date on which it was filed; adding that he did not even know, when the said affidavit was actually filed.

Contrariwise, on 14th January 2021, J. T. Mansaray Esq. asserted that it was rather unfortunate that, on the very day that the preliminary objection was raised, S. A Conteh Esq. made submissions that clearly contravened the rules, but could not cite the actual submissions that were in contravention of the rules. He emphasized the significance of Order 2 Rule 2 of the HCR 2007, which concerns the effect of non-compliance with the rules; and craves the court's indulgence for leave to be granted to the Plaintiff/Applicant, to file the requisite papers, for the matter to be expeditiously proceeded with; stating that the application for leave to amend, is based on Order 23 Rule 7 of the HCR 2007. Procedurally, on 5th April 2022, S. A. Conteh Esq. replied that the provision (Order 23 Rule 7 of the HCR 2007), which J. T. Mansaray Esq. relied on, does not reflect any clear response to his jurisdictional objection; emphasizing that the objection is not one of mere irregularity, but one that touches and concerns an indisputable jurisdictional issue.

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1.3 Analytical Exposition

Having presented the arguments, as they unfolded before this Honourable Court between 24th March 2020 and 5th April 2022, I must now proceed to unpick them in the context of the subsisting laws, that regulate the issues that are cognate with every bit of the arguments. Thus, the objection cannot be said to be either eclectic nor amorphous; neither can it be said to be baseless and not founded in law. The objection is clearly and straightforwardly founded in law. This point strikes a chord with a peculiar characteristic feature of a preliminary objection. The peculiarity of that feature is rather rooted in the incontestable legal position that preliminary objections are predicated on law and nothing else but law. The jurisprudence on preliminary objection, has evolved with a plethora of decided cases in Sierra Leone and the Commonwealth jurisdiction.

Moreover, the salient principle, underscoring any preliminary objection is that, it must be based on a point of law; if it is to be entertained by any court of competent jurisdiction. The Courts' decisions in Taakor Tropical Hardware Co. Ltd. **v.** The Republic of Sierra Leone (ECW1 CCJ/JUD/02/19 (2019) ECOWAS CJ1 (24TH January, 2019); Zaria Amira Amina Mara **v.** Managing Director Standard Chartered Bank and Others (FTCC 237 of 2018) (2019) SLHC 47 (11 July 2019); Yaya **v.** Obur and Others (Civil Appeal 81 of 2010) (2020 UGHC 165 (30 October, 2020); Kassam Kousa **v.** Alie Basma (CC:215/2019/C N0.31); Lovetta Bomah and Others **v.** PMDC (cc306 of 2018) 2021 SLHCL PED 27 (16 March, 2021); and S **v.** Joseph Saidu Mans and Another (CC: 31 OF 2018 2021 SLHC LPED 27 (16 March, 2021), are unambiguously instructive on this rule of law.

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In fact, a preliminary objection is not a preliminary objection, if it is based on facts, which evidential significance, can obviously be determined during the course of the proceedings. Thus, when heard, a preliminary objection can either be disposed of immediately; or its ruling may be deferred, in circumstances wherein its determination, will undoubtedly impact the outcome of a matter {see Yaya **v.** Obur and Others (Civil Appeal 81 of 2010) (2020 UGHC 165 (30 October, 2020). Essentially, the preliminary objection, with which this Honourable Court is faced, is bound to be determined at this stage, because the legal issues that characterize it, would have no impact on the outcome of this matter, should it proceed to its logical conclusion. The first issue (that is cognate with the substantive law) that should be examined to determine whether the preliminary objection should or should not be upheld, concerns the jurisdiction of the High Court of Justice of Sierra Leone.

Thus, this point about the High Court of Justice not having jurisdiction to preside over this action, was made quite prominent and salient, in the protestation of A. S. Conteh Esq.; regarding the reason why he thinks the notice of motion, dated 13th February2020, commencing this action, in the High Court of Justice, should be struck out. Meanwhile, jurisdictional issues are the structural architecture, upon which judicial functionality is built. Thus, in matters wherein jurisdictional issues emerge, the courts are bound to address them, before they are even obliged to proceed with such matters, should it turn out that the courts really have jurisdiction to preside over them. However, when courts are faced with matters for which they do not have any jurisdiction, they immediately become functus in the determinations of such matters.

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Significantly, sections 132 and 134 of the Constitution of Sierra Leone, Act N0.6 of 1991 (hereinafter referred to as Act N0.6 of 1991), enunciate the original exclusive, appellate and supervisory jurisdiction of the High Court of Justice. Thus, section 21 of the Courts Act N0. 31 of 1965 (hereinafter referred as Act N0.31 of 1965) also touches and concerns the jurisdiction of Sierra Leone's High Court of Justice. This later provision articulates the court's overwhelming civil jurisdiction; and the surrounding circumstances, in which that jurisdiction is circumscribed. Circumspectly, the said section 21 has to be read in tandem with section 18 of the same statute. Thus, whereas section 18 focuses on the unlimited jurisdiction of the High Court of Justice, subject to certain exceptions, section 21 clarifies some of those exceptions, in the exercise of its original exclusive jurisdiction, relating to customary law (which by its very nature and structure has restrictive applicability in Sierra Leone).

Further, the Third Schedule of Act N0.31 of 1965, articulates a plethora of thematic issues, from which many civil disputes may arise, that shall never be presided over by any Magistrate Court in Sierra Leone. In effect, that schedule clearly explicates the original exclusive jurisdiction of the High Court of Justice as generically stated in section 132 of Act N0.6 of 1991. So, the Third Schedule of Act N0.31 of 1965, also has to be read in tandem with particularly subsection (1) of section 132 of Act N0.6 of 1991. Thus, an indisputable construction of section 21 of Act N0.31 of 1965 is that the High Court of Justice, does not have original exclusive jurisdiction to preside over specific matters, relative to the determination of title to land situated in the provinces, other than the title to a leasehold granted under the Provinces Land Act, Cap. 122 of the Laws of Sierra Leone, 1960; neither can it establish the existence or dissolution of any marriage contracted in accordance with customary

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law; or any claim, relating to any marriage governed by customary law; nor can it determine the administration of estates of deceased persons, where such administration is governed by customary law.

Thus, the order to grant a stay of execution of the Order of Magistrate Cowan (deceased) of 10th February 2020, and all subsequent proceedings, pending the hearing and determination of the pending application; the order to set aside the orders of Magistrate Cowan, dated 1st July 2019 and 10th February 2020 respectively; the order that the 1st Plaintiff/Applicant, whose name appear on a Letter of Offer, dated 16th January 2019 and a survey plan marked LOA 12568, dated 17th October 2019, be declared the lawful lessee and person entitled to possession and occupation of the property situate, lying and being at the Back of Cockrill, Off Wilkinson Road, Freetown, as property leased to him, by the Ministry of Lands, Housing and Country Planning, on behalf of the Government of Sierra Leone; are very clear orders, which the High Court of Justice (in its original exclusive jurisdiction) can grant in accordance with the above provisions.

Analytically, to assume that the preliminary objection, which S. A. Conteh Esq. raised to the application, is jurisdictional, is as unrealistic as it is bizarre. Nonetheless, in as much as this Honourable Court cannot hold, that the preliminary objection is strictso senso jurisdictional; it simultaneously cannot dismiss it as one that lacks merit. Thus, the preliminary objection is meritorious, because it touches and concerns, a very serious point of adjectival law, that is cognate with the question of how proceedings are begun in the High Court of Justice. Essentially, Order 5 Rule 1 of the HCR 2007, concerns the modes by which actions are begun in Sierra Leone's High Court of Justice. The provision thus reads:

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'Subject to any enactment of these rules, civil proceedings in the Court *(the High Court of Justice)* may be begun by writ, originating summons, originating motion or petition' (my emphasis in parenthesis and italics).

Bizarrely, it is discernible from the contents of the papers filed that this action has not come to this Honourable Court by any of the aforementioned modes, stated in Order 5 Rule 1 of the HCR 2007. Thus, this action is improperly brought to this court by a notice of motion, dated 13th February 2020. This singular act contravenes the foregoing provision; and simultaneously raises the question of whether this action is really apt or even proper for it to be in this court. Thus, my interpretation of the provisions in the HCR 2007, regarding applications that are made by notices of motion, are those made in respect of interlocutory proceedings, that had been commenced by any of the modes of commencing actions, contemplated in Order 5 Rule 1 of the HCR 2007.

The next issue which S. A. Conteh Esq. raised is in respect of the so-called defective form of the affidavit that bolsters J. T. Mansaray's application. This point is as well founded in the provisions of Order 31 of the HCR 2007. Thus, assuming without conceding, that the said affidavit is defective; nothing precludes this Honourable Court, from accepting that affidavit in its defective form. The provision in Order 31 Rule 4 is indubitably instructive on this point. Nonetheless, my examination of the application's bolstering affidavit has asseverated the following irregularities: First, it does not confirm the name of the person or law firm that files it. Secondly, it does not asseverate the name of the party to the action, on whose behalf it is filed. Thirdly, it does not point to any date on which it was actually filed (see the bottom part of J. T. Mansaray's affidavit; specifically, the blank portion of the document,

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after the signature of the Commissioner of Oaths that signed it). Thus, the three irregularities, espoused above, are in contradistinction to the Provisions in Order 31 Rule 9 (1). Contrariwise, my perusal of the said affidavit does not confirm S. A. Conteh's submission that the paragraphs in the affidavit are unnumbered and therefore in contravention of Order 31 Rule 1 (6) of the HCR 2007. Thus, the bolstering affidavit is accordingly numbered; and it is constitutive of a total of twenty (20) paragraphs. However, notwithstanding the foregoing catalogued irregularities, embedded in the said affidavit, this Honourable Court considers it just, fair and reasonable to accept it in its defective form, in accordance with the provision in Order 31 Rule 4 of the HCR 2007.

The final issue in the preliminary objection that requires consideration is the submission that neither the Master and Registrar of the High Court of Justice, nor the Assistant Deputy Registrar, should have been copied in any documentation that seeks to commence an action in the High Court of Justice. This submission is very true; and J. T. Mansaray Esq. in his response to the preliminary objection, did not allude to the reason, why he copied in both the Master and Registrar of the High Court of Justice and the Deputy Assistant Registrar of the Magistrate Court, in that very document, purporting to have commenced the action. Nonetheless, J. T. Mansaray rather relied, on Orders 2 Rule 2 and 23 Rule 7 of the HCR 2007, to save his application from the clutches of the preliminary objection. Thus, the procedural issues that suddenly emerge at this stage are whether, it is procedurally expedient for the notice of motion to be amended, pursuant to Order 23 of the HCR, 2007 and whether Order 2 Rule 2 of same, can be reasonably invoked to save this action.

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Meanwhile, Order 2 Rule 2 contemplates circumstances of non-compliance with the rules and the court's discretion to allow for amendments and not to nullify the proceedings, when it deems it just, fair and reasonable to do so. Moreover, Order 23 Rule 7 touches and concerns amendments with certain documents, other than writ of summonses, originating notices of motion, originating summonses and petitions, on such terms as to cost or otherwise as may be just or in such manner as the court may direct. Essentially, whereas Order 23 Rule 5 deals with amendments of writs or pleadings with leave; Order 23 Rule 6 contemplates amendments of order originating processes, other than writ of summonses. Thus, the applicability of Order 2 Rule 2 in the face of the preliminary objection, is as impossible as it is unjust to Order 5 Rule 1 of the same HCR 2007, which is a mandatory provision, depicting how actions are begun in the High Court of Justice.

Further, regarding Counsel's allusion to Order 23 Rule 7, this Bench again holds the view that it is as inapplicable as it is impossible for it to save the application from being relegated to the doldrums of procedural nullity. And the response to S. A. Conteh's preliminary objection, based on the said Order 23 Rule 7, is obfuscating to an extent that this Honourable Court (in its wisdom) does not consider it applicable. In fact, if it were an application, it should have been made by a notice of motion, supported by the requisite affidavit. That was a mere submission, embedded in J. T. Mansaray's response; it is therefore not an application. So, it is hereby categorically denied. Nevertheless, Order 23 Rule 7 concerns amendments of other documents, in circumstances wherein such documents have been rightly filed, but are somewhat tainted with irregularities.

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The provision does not contemplate the amendment of any document that is filed in contravention of the rules. In fact, how can a document that is filed in contravention of the rules, be amended in the first place? The rules of procedures are sacrosanct; and it is the responsibility of the court to hold them sacred and give sanctifying succour to them. So, the rules are meant to be upheld; they are not meant to be circumvented, to occasion injustice, to any of the parties to every civil litigation. However, to stretch the analysis in search of further justification, concerning the reason why the preliminary objection, should not be dismissed, this Honourable Court relies on section 9 of the Summary Ejectment Ordinance, Cap. 49 of the Laws of Sierra Leone, 1960. The section thus reads:

> **Any person aggrieved by the decision of the Magistrate may, within eight days, appeal to the High Court: An appeal shall not operate as a stay of execution: Provided that, in cases where the appeal is by a tenant ordered to be ejected, the Magistrate shall grant a stay of execution, upon the tenant giving security for costs in such sum as the Magistrate shall deem sufficient as against any act of damage or waste to the premises. Save as aforesaid, the procedure, on appeal, shall be in accordance with the provisions of the laws of the Colony in relation to appeals from decisions of the Magistrate.**

Significantly, the foregoing provision in Cap. 49 is quite versatile; its versatility is analytically rooted in the fact that it addresses a plethora of somewhat complex issues in the context of the substantive and adjectival law. Thus, from the standpoint of the substantive law, it clearly clarifies the issue of appeals from the decisions of the Magistrates' Court, concerning summary ejectment proceedings.

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And on the framework of the adjectival law, it whirls around the period within which an aggrieved person, against whom a decision is made in the Magistrate Court, can appeal to the High Court of Justice; it also swirls around the fact that, an appeal does not amount to a stay of execution; that a Magistrate is bound to make an order for a stay of execution in every circumstance, wherein an ejected tenant provides security for cost in respect of damage and waste to a rented reality etc.

The question that is to be asked at this state is whether in the contexts of the substantive and adjectival laws, the Plaintiff/Applicant really complied with section 9 of Cap 49, in bringing this action to the High Court of Justice? The answer is certainly no. First, the Plaintiff/Applicant cannot be strictly dubbed as such; for this matter is not properly before this Honourable Court. A litigant can only be a plaintiff, before the High Court of Justice, when he/she begins an action, pursuant to any of the originating processes, contemplated in Order 5 Rule 1 of the HCR 2007. This is not the case in this case. Secondly, the exparte application for a stay of execution, made before the Late Magistrate Cowan; was indeed made in contravention of section 9 of Cap. 49. Thus, it was made with no security for cost, which the said section 9 makes clearly mandatory.

Thirdly, there is no record of any documentation of an appeal from the Magistrate Court, concerning this matter, before this Honourable Court. Apart from the fact that, this matter is not procedurally properly placed before this court; it should be borne in mind that an appeal does not amount to a stay of execution. So, would it be prudent for a court of competent jurisdiction to stay the execution of a judgment of a subordinate court in a circumstance wherein that judgment has not been appealed? So, should such an order be made; it would amount to a stay of

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execution in futility. Stay of executions are mostly granted, pending appeals; and this instant case has not been appealed at all. Fourthly, as it stands, the eight (8) period contemplated in the said section 9 had long elapsed; so, an appeal can be filed with leave of this Honourable Court, notwithstanding the fact that the statutory period contemplated in the said section 9 has elapsed. Nevertheless, should Counsel for the so-called Plaintiff/Applicant, choose not to appeal the Judgments of Magistrate Cowan, dated 1st July 2019 and 10th February 2020 respectively, he can even file papers in the High Court of Justice, for an order of certiorari to quash the said judgments, if at all Counsel thinks that those Judgments, were made in contradistinction of the law (Cap.49), pursuant to which the orders were made. Meanwhile, on the strength of the foregoing analysis, I unreservedly uphold the preliminary objection; and simultaneously dismiss the application on the ground of procedural incongruity and nullity. I make no order as to cost.

I so Order.

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

20/6/2022

Justice of the Superior Court of Judicature

of the Republic of Sierra Leone

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