CC166/19 2019 S N0. 13

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Mustapha Sesay

Suing as the Administrator of the Estate **Plaintiff**

Of Alhaji Foday Sheik Kabirr Sesay

5 Upper Bombay Street

Freetown

And

Mr. Mustapha Maju

Madam Mariatu Kamara

Mr. Alusine Fofanah (Head Man) **Defendants**

Mammy Haja

Mr. Rustin Kabba

All of Jama Town Diversion

Freetown

Counsels:

M. Sesay Esq., for the Plaintiff/Respondent

T. Kelly Esq. and M. J. M Sesay Esq. for the 5th Defendant/Applicant

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Ruling on a Preliminary Objection, Regarding an Application to Set Aside a Judgement in Default of Appearance, etc.

1.0 Introduction

This ruling is predicated on an application made by Garber and Co. Solicitors and Advocates, on behalf of the 5th Defendant/Respondent, by way of a notice of motion, dated 11th September, 2019, pursuant to Rule 9 of Order 13 of the High Court Rules, Constitutional Instrument N0. 28 of 2007 (hereinafter referred to as the High Court Rules, 2007), to *inter alia*, set aside this Honourable Court's Judgement in Default of Appearance, dated 10th July, 2019. The application, as filed, is bolstered by the requisite affidavit, sworn to by one Rugiatu Kabba, and dated the 11th September, 2019.

1.1 The Protestations of Counsel for the Plaintiff/ Respondent

Contrariwise, Counsel for the Plaintiff/Respondent, chose not to file an affidavit in opposition, contesting the application of 11th September, 2019. Meanwhile, on Tuesday, 1st October, 2019, M. J.M Sesay Esq., came to move this Honourable Court on the contents of the aforementioned notice of motion. Nevertheless, immediately he commenced his application, Counsel for the Plaintiff/Respondent, raised a preliminary objection, consequent on the following contentions:

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1. The Counsel for the 5th Defendant does not have any locus standi in this matter. He entered appearance on behalf of the 5th Defendant/Applicant on the 5th September, 2019. The appearance was entered after the 5th Defendant/Respondent had died.
2. The deponent to the affidavit in support of the application is one Rugiatu Kabba, who is not a party to this action. Even the papers filed are faulty. The parties are not properly identified; they are erroneously identified as 'Plaintiff' and'Defendants'.
3. The orders prayed for are fictitious and non-existent. There is nothing in the High Court Rules, 2007, as *'ex parte interim injunction'*. The backing of the affidavit in support of the application for an 'interim ex parte injunction is improper.

Counsel conclusively vociferously pilloried the affidavit insupport of the application and the entire contents of the foregoing notice of motion; and cautioned that the application is ill-suited and does not have any legal legs to stand on, because it is made in fundamental contravention of the rules. He urged this Honourable Court to dismiss the application with substantial cost.

1.3 The Argumentations of Counsel for the 5th Defendant/Applicant

However, Counsel for the 5thDefendant/Respondent, opposed the contentions, on which the preliminary objection is consequent, and

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canvassed the following protestations, in justification of why he felt that the preliminary objection, should be relegated to the backwaters:

1. Counsel for the Plaintiff/Respondent spoke about non-compliance with Orders 12 and 18. This failure is an irregularity, which cannot nullify the proceedings (see Order 2 of the High Court Rules, 2007 and page 10 of the Annual Practice, 1999).

2. Since the irregularities complained-off do not in the light of Rule 2 of the said Order 2, constitutea procedural nullity, the preliminary objections, should be overruled; and Counsel for the Plaintiff/Respondent, should go file his affidavit in opposition, for the substantive issues raised in the notice of motion dated 11th September, 2020, to be argued.

3. Should Counsel rely on Order 2 for purposes of setting aside for irregularities, he should have come by summons or a notice of motion; pursuant to Sub rule (2) of Rule 2 of Order 2, and not by making any oral preliminary objection.

1.4 The Analysis

In this analysis, I shall review the position of the law, in relation to the arguments, which both Counsels have sequentially canvassed; and

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simultaneously determine, whether the application, should or should not be granted. The first submission on which Counsel for the Plaintiff/Respondent, predicated his preliminary objection, is that Counsel for the 5th Defendant/Applicant, does not have any locus standi in this action, because he filed in an appearance on the 5th day of September, 2019, on behalf of the said Defendant/Respondent, after his death. To this protestation, Counsel did not make any contrary submission, but rather chose to rely on Order 2 of the High Court Rules, 2007.

Essentially, Order 12, which concerns itself with appearance in general, depicts a plethora of specificities regarding, who can enter an appearance and how it is done; notice of appearance and defendant's address for service; defendant in person and fictitious or no address; form of memorandum and officer to enter memorandum; defendants appearing by same solicitor; time limited for appearance and late appearance; probate intervention and conditional appearance; prohibition of conditional appearance and entering of appearance not amounting to a waiver and dispute as to jurisdiction.

Meanwhile, as articulated above, the latitude of the Order is so broad that, even in the circumstances, wherein the provisions in the rules that engulf that Order are stretched to their farthest extreme, it will still be incomprehensible to envisage or appreciate any circumstance, pursuant to which Counsel can posthumously enter an appearance for

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the 5th Defendant/Respondent. Alas! My reading of the rules in Order 12, depicts that appearance, can only be entered by the Defendant or his solicitor, when both are alive.There is nothing in the multiplicity of provisions in Order 12 that confirms that a representative (in this case a solicitor), can enter appearance on behalf of a deceased defendant.

The question that is to be raised at this stage is, where did Counsel get the instructions to enter an appearance as a solicitor on behalf of the 5th Defendant/Respondent, when he was not even there to give such instructions? The answer to this question is that, such instructions would not have come from the 5th Defendant/Respondent, because he was no longer a member of the human race, when the appearance was purportedly entered, on his behalf. Thus, the foregoing analysis clearly indicates that the appearance of 5th September, 2019, made on behalf of the deceased 5th Defendant/Respondent is in contravention of the spirit and intendment of the provisions of Order 12.

Moreover, the second ground of the preliminary objection, relates to the capacity of the deponent of the affidavit in support of the application, to set aside the Judgement in default of appearance of this Honourable Court, dated the 10th July, 2019. Again, Counsel for the 5th Defendant/Applicant, did not respond to his colleague's argumentation on this point, but rather relied on the same Order 2 as a defense. However, there are two (2) issues, central to the aforementioned ground of objection, that battle for the requisite attention, salience and

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valence; and eventual determination, in this ruling. The first relates to the capacity of the deponent of the aforesaid affidavit; and the second revolves around the request to set aside the default Judgement, dated the 10th July, 2019.

Meanwhile, I am meticulous about only the first issue, because it is one of the issues, which really underscored the preliminary objection that is to be determined. Nevertheless, I am rather concerned that the second issue, cannot be determined in this ruling, because its determination is contingent on the preliminary objection, which is yet to be determined; therefore, the psychic energy that is to be dissipated, in the determination of whether the foregoing default Judgement, should or should not be set aside, will be diverted to the determination of the preliminary objection, with the greatest degree of lucidity. So, I will wait to subsequently determine the request, to set aside the foregoing default Judgement, should the need raises.

However, it is clear from the affidavit in support of the application, dated 11th September, 2019, that its affiant is not a party to this action. She is Rugiatu Kabba; her name is nowhere mentioned in the documentations of this action; other than the affidavit, she claimed to have faithfully deposed to. So, it is clear that she is a complete stranger; or even an alien in this action. The question that is to be determined, is whether a person, who is not a party to any action, is permissible by

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the High Court Rules, 2007, to depose to facts in an affidavit, which veracity are to be determined by a court of competent jurisdiction?

This question can be satisfactorily answered in the affirmative. My position on this issue is bolstered by the quintessential rules of Order 31, which encompasses, the provisions relating to the form and contents of affidavits; their significance, authenticity etc.Fundamentally, it is rationalised in trite law that affidavits are of evidential value in the determination of even a pre-trial motion. Again, there is nothing in Order 31 that says that a deponent to an affidavit must be a party to an action; for it to be of evidential value.

Any person that is *au fait* with the facts and facts in issue of any matter, can depose to an affidavit in respect of any matter that is to be determined by the Courts. Should a party to an action is disillusioned with any fact that is deposed to in an affidavit, nothing precludes that party, from cross-examining the affiant to ascertain the veracity of the facts and the facts in issue, deposed to in that affidavit. So, if Counsel for the Plaintiff/Defendant, is disenchanted with an of the facts, deposed to in the affidavit of the 11th of September, 2019, nothing precludes him from ascertaining the veracity of the facts, deposed to in that affidavit, should be oriented or inclined to do so.

Moreover, the other point to address by allusion to the requisite provisions in the High Court Rules, 2007, revolves around the submission thateven the papers that are filed by Counsel for the 5th

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Defendant/Respondent are faulty. On this point, Counsel on the other side, vehemently argued that the parties are not properly identified; and they are erroneously identified as 'Plaintiff' and 'Defendants'; whilst noting thatthe orders prayed for are fictitious and non-existent, because there is nothing known in law as *'ex parte interim injunction'*. He finallystated that the backing of the affidavit in support of the application for an 'interim ex parte injunction' is improper.

Again, to this submission, Counsel for the 5th Defendant/Respondent, without adducing any contrary argument, also relied on Order 2 of the High Court Rules, 2007. Nonetheless, my reading of the papers filed, confirms that the parties are not accordingly defined. The parties should have been defined as Plaintiff/Respondent on the one hand, and Defendants/Applicants, on the other hand. This description is quite apposite; it practically reflects the fact that though, this Honourable Court, will have to determine the veracity of the Plaintiff's Particulars of Claim, embedded in the Writ of Summons, commencing this action; it is now obliged to determine whether to grant or not to grant, a number of specific orders, pursuant to the 11th September, 2019, pre-trial motion, filed by the Defendants, who for the purposes of that application are the Applicants.

That is why they should have been dubbed as such. The Plaintiff should also have been described as Respondent, because he is the one coming to respond to the said pre-trial motion, which the Court is obliged to

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determine, before proceeding with this matter.Therefore, the parties should have been described as Plaintiff/Respondent, because the action is originally initiated by the Plaintiff, who is now the Respondent to the said pre-trial motion; and Defendants/Applicants, because it is they, who have come to defend the original action, but the status quo of the matter, demands an application for a number of orders, which they think the justice of this case requires; hence they should have been dubbed Defendants/Applicants.

Further, there is nothing in the High Court Rules, 2007, that bears the nomenclature *'ex parte interim injunction'*, inscribed in the second order, prayed for on the face of the notice of motion, dated 11th September, 2019. More so, the backing of the affidavit of the said application, bearing the same date, is in contravention of the purpose for which it is filed. It bears the unintelligible words *'affidavit in opposition of ex parte'*. Nonetheless, the foregoing descriptions, are irregularities, which any conscientious legal practitioner, should have amended, before filing his papers.

Meanwhile, as articulated above, Counsel for the 5th Defendant/Respondent, only relied on Order 2 of the High Court Rules, 2007, and chose not to respond to any of the aforementioned submissions, which Counsel on the other side, raised in justification of why he felt that this Honourable Court, is bound to uphold the preliminary objection. The overwhelming reliance, which is placed in

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Order 2, by Counsel for the 5th Defendant/Respondent, undoubtedly necessitates, an analysis of the significance of that Order to this application.

In general, Order 2 specifically addresses the issue of non-compliance with the rules of procedure in the High Court Rules, 2007. Sub rule (1) of Rule 1 of Order 2 thus provides:

> *"Where, in beginning or purporting to begin 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 these 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, Judgement, or order therein".*

The rationale of the foregoing provision is to prevent the web of procedural justice from overwhelming the quest for substantive justice; for justice is freshest, when it is swiftest. So, Order 2 prima facie prevents litigants and solicitors, from relying on minor technicalities, to forestall the delivery of substantive justice. Essentially, the author of the White Book (The Supreme Court Practice 1999), are very clear on this. Their analysis between pages 9 and 12, articulates with precision, the circumstances, in which the Courts were prepared, to dub

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incongruities in civil proceedings, as either mere irregularities, or procedural nullities.

Meanwhile, their dichotomizing consideration in pinpointing this contradistinction is rooted in the fatality of the incongruities. Thus, if the incongruities, are not fatal, they can satisfactorily be dubbed as mere irregularities. But, in every circumstance, in which the incongruities are fatal, then they are considered procedural nullities. See the cases of Re Pritchard {1963} Ch. 503 and Harkness v Bell's Asbestos & Engineering Ltd. {1967} 2 Q. B 729, Page 735, C. A., wherein the Courts ruled that the irregularities that were complained- off, were not sufficient enough to nullify the proceedings, but the proceedings were nullified in Bernstein v Jackson {1982} 1 W.L.R.1082 and Charlesworth vFocusmulti Ltd.{1993} The Independent, March 15, C. A, because the incongruities were deemed fatal.

The above analysis should guide and guard this Honourable Court in determining whether the irregularities complained-off, really meet the threshold of procedural nullity or not. First, Counsel for the Plaintiff/Respondent, never lied on Sub rules (1) and (2) of Rule 2 of Order 2 to set aside the proceedings. In fact, it would have been foolhardy of him to make such application; because it was he who issued the Writ of Summons, commencing this action. And the Court's records of this action, depict that he has taken a number of steps, since the commencement of this action.

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Nevertheless, it is Counsel for the 5th Defendant/Applicant that placed total reliance on Order 2, in respect of the preliminary objection, raised by Counsel on the other side. So, the submission of Counsel for the 5th Defendant/Applicant that Counsel on the other side, should have come by summons or motion, depicting the grounds of objection; is a misnomer, because he has only raised a preliminary objection, which is not an objection that dovetails with any of the provision in Order 2.

Secondly, the appearance that is entered on behalf of the deceased 5th Defendant/Applicant, is fatally in contravention of the provisions of the rules in Order 12; hence this irregularity cannot be saved by any reliance on the provision of the rules in Order 2. Thirdly, the inexactitudes, relating to the order of *'interim ex parte injunction'*, as prayed for in the notice of motion, dated 11th September, 2019, how the parties are described therein, and the erroneous and unintelligible words, *'affidavit in opposition of ex parte'*, in the affidavit that bolstered the said notice of motion, can indeed be saved by Order 2.

However, although this Honourable Court, can order for the requisite amendments to be done on the papers filled by Counsel for the 5th Defendant/Applicant; such amendments, cannot forestall the compelling tendency of the preliminary objection, which is hereby upheld; on the ground that the appearance, entered in this matter, on behalf of the 5th Defendant/Applicant, is a complete infringement of the provisions of the rules of Order 12 of the High Court Rules, 2007.

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Moreover, the said appearance, and every other papers filed, pursuant to that appearance, are thus accordingly expunged, from the records of this matter; which is still being heard by this Honourable Court.

Meanwhile, I will invite the Counsel, whose papers have been appositely expunged to look at particularly the provisions of the rules of Order 18 carefully, before filing any other papers in this matter. Finally, he shall pay a cost of One Million Leones (Le 1, 000, 000) to Counsel for the Plaintiff/Defendant.

I so order.

20/2/2020

Abou B. M. Binneh-Kamara, J.

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