CC. 398/20 2020 K. N0.82

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Pa Alimamy Kanu II - 1st Plaintiff/Respondent

Marie Kanu - 2nd Plaintiff/Respondent

N0. 14 Mehuex Street

Hastings

Freetown

And

Umaru Bah - 1st Defendant/Applicant

Foday Mohamed Turay - 2nd Defendant/Applicant

Hassan Kamara - 3rd Defendant/Applicant

Samuel Sesay - 4th Defendant/Applicant

Daniel Cole - 5th Defendant/Applicant

N0. 31 Burgoyne Street

Hastings

Freetown

Counsels:

Elvis Kargbo, Esq. for the Defendants/Applicants

Y. M. Kamara, Esq. for the Plaintiffs/Respondents

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Ruling on an Application to Set Aside the Judgement of this Honourable Court, dated the 1st day of February, 2021 and for this action and another to be Consolidated etc., delivered by the Hon. Dr. Justice Abou B. M. Binneh-Kamara, on Monday, 28th June, 2021.

1.1 Background and Context.

This ruling is built on an application by notice of motion made by Betts and Berewa Solicitors, on the 29th April, 2021, for and on behalf of the Defendants/ Applicants, in respect of the following orders:

1. That this Honourable Court grants an interim stay of execution of the judgement dated the 15th day of February 2021 the court order dated 30th March 2021 and all subsequent proceedings, pending the hearing and determination of this application.
2. That this Honourable Court grants an order setting aside the judgement dated the 15th day of February, 2021 and all subsequent proceedings on the ground that the defendants have a good and valid defence on the merit.
3. That the action CC: 398 K. 82 Between Chief Pa Alimamy Kanu II and Marie Kanu **v.** Umaru Bah, Foday Mohamed Turay and Others **And** the action, CC 399 k. 83 Between James Mohamed Kamara and Others be consolidated by this Honourable Court in the interest of justice and for a fair trial.
4. Any other order(s) that this Honourable Court may deem just in the circumstance.
5. The cost of this application to be paid by the Defendants/Applicants.

Meanwhile, the foregoing application is bolstered by the affidavit of Joseph M. French, a barrister and solicitor of the High Court of Sierra Leone, sworn to and dated the 29th April, 2021; attached thereto, are six (6) exhibits marked JMK1-7. Contrariwise, Counsel for the Plaintiffs/Respondents (Y. M. Kamara Esq.) chose not to address the court on any point of law, concerning the aforementioned orders as prayed. Rather, he elected to file an affidavit in opposition, debunking the contents (in its entirety) of the affidavit that bolstered the application. The debunking affidavit as sworn to by the said Counsel of Gavao and Associates, is dated 21st May 2021; it contains three (3) exhibits marked Exhibit YMK1-3. Furthermore, a supplemental affidavit (to the affidavit in opposition) sworn to by the same Solicitor and dated 25th May, 2021, was also filed to strengthen the facts in the original

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affidavit in opposition of 21st May, 2021. Thus, my readings of the affidavits, raise a number of conflictual issues, which are cognate with whether this Honourable Court, should grant or refuse the foregoing orders as prayed. Moreover, there are also a number of submissions made by the counsels, representing the parties that should not be left to fester unconsidered. Against this backdrop, I will now contextualize the most salient points of their arguments, with the apposite prominence, valence and salience.

1.2 The Arguments of Counsel for the Defendants/Applicants.

Elvis Kargbo Esq. canvassed the following arguments to convince this Honourable Court to grant the application:

1. That a Judgement in default of defence was obtained against the Defendants/Applicants herein [see Exhibit JMF 4 (2)}. That judgement was handed down on the 15th February, 2021. It is a lop-sided judgement. It was in fact obtained without service of the requisite processes on the other side. An appearance had been entered. So they ought to have served the processes culminating in that default judgement on the other side.
2. A defence dated 10th December, 2020, had been filed. But when the court's records were searched, the said defence could not be located in the file. This might have been an administrative lapse. Thus, Exhibit JM4 (1) is a proposed defence; it is akin to the defence filed on the aforementioned date. The Defendants/Applicants do really have very good defence on the merits.
3. There subsists a title deed in the names of the Defendants/Applicants; that deed encompasses a survey plan from the Ministry of Lands (See Exhibit JMF5).
4. There are two writ of summonses (See Exhibits JMF1 and JMF6). The said writ of summons are in respect of the same res (subject matter) and the same Defendants. This is what really necessitates the application for the consolidation of the aforesaid matters. Order 4 Rule 1 of the High Court Rules 2007 (hereinafter referred to as The HCR, 2007) is accordingly referenced.

1.3 The Arguments of Counsel for the Plaintiffs/ Respondents.

Y. M. Kamara Esq. adduced the following arguments, seriatim, in justification of why he thinks the Defendants/ Applicants, should not be granted by this Honourable Court:

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1. The Defendants/Applicants failed to attach evidence of receipt of the payment in respect of the defence to their affidavit;

2. The Defendants/Applicants had sufficient notice that the motion for a default judgment was to be moved. Thus, Exhibit YMK2 which is a notice of hearing, dated 29th January, 2021 is referenced;

3. The Plaintiffs/Respondents are the fee simple owners of that piece and parcel of land, mentioned in the writ of summons, commencing this action in question; as theirs pre-dated that of the Defendants/Applicant; and

4. The parties to the writ of summons are different. Thus, Exhibit YMK3 in the affidavit in opposition is succinctly alluded to in comparison with the writ of summons attached to the supplemental affidavit, which is Exhibit YMK1. This second writ of summons concerns James Mohamed Kamara, suing through his lawful Attorney Mohamed Hamid Kamara. And the res in each of the writ of summonses, are also different.

1.4 The Analysis.

Meanwhile, it should be noted that this Honourable Court (on Wednesday, 5th May, 2021), granted the first order as prayed (the interim injunction); and simultaneously made an order for notice of hearing to be sent to Counsel for the Plaintiffs/Respondents, for him to come argue (see 1. 2 and 1.3) the contents of the motion of 29th April, 2021. So there is no need to deal with that order herein. Nonetheless, this analysis articulates the law in tandem with the other foregoing orders as prayed; and the facts deposed to in the affidavits in support and that in opposition, together with the supplemental affidavit as well.

1.4.1 Unpicking the Remaining Orders as Prayed.

The second prayer concerns setting aside the default judgement of 15th February, 2021 and all subsequent proceedings, pending the hearing and determination of the aforementioned application, on the ground that the Defendants/Applicants have a good and valid defence on the merit. Meanwhile, the order of 15th February, 2021, which is being challenged, is a default judgement, based on procedural, as opposed to substantive justice. In effect, it was granted in the absence of the order side, who now insists on his constitutional right (audi alteram partem) to be heard. As a constitutional and a human right, it is even recognised and protected in

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international human rights law[1]. The pleading of this constitutional principle at this stage of the proceedings is quite apt; bearing in mind that the order, which the Defendants/ Applicants want to set aside, may culminate in an execution, resulting in the sale of the realty, which may occasion, a difficult situation, bringing in a third party's right, which may be anchored by the concept of the bona fide purchaser for value without notice. This latter permutation will certainly affect and undermine, whatever legitimate interest, if at all, the Defendants/Applicants might have hard in the realty in question. Thus, the interconnectivity of these facts, are therefore tied to the fair and reasonable determination of the above application, in the interest of justice. A thoughtful analysis of the foregoing interwoven permutations, raises a number of complex issues, which this Honourable Court must clarify, in tandem with all the issues, raised in the Defendants/ Applicant's supporting affidavit, alongside those in the opposing affidavit. At this stage, I will raise three (3) questions, pertaining to the conflicting interests of the parties to the application, in order to resolve them, in the very light of the subsisting rules of law, which I am obliged to apply to the issues.

1. Of what relevance is the principle of audi alteram partem; in a situation in which a default judgement, is sought to be set aside?
2. What is the position of the law in a circumstance in which a default judgement is obtained in violation of a rule of law (substantive or adjectival-procedural)?
3. Again, would it therefore be procedurally expedient to consolidate this matter and the other seemingly related one that is ongoing in the High Court of Justice?

Thus, I will proceed to sequentially answer the above questions, by relying on the most salient and prominent legal authorities in the subsisting literature, relative to the foregoing issues, from the standpoint of the substantive and adjectival laws. By substantive law, I mean the corpus of civil and public law, creating rights and

[1] See Article 10 of the Universal Declaration of Human Rights (UDHR) 1948; Article 11 of the International Covenant on Civil and Political Rights (ICCPR) (1966) and Article 9 of the African Charter on Human and Peoples Rights (ACHPR) (1981/1986). The UDHR is a constituent part of customary international law, an authoritative interpretation of the United Nations Organisation's Charter and a norm of imperative character that cannot be derogated from on ground of sovereignty in international law. This later status gives legality and constitutionality to the applicability of the UDHR in our legal system by any court of competent jurisdiction. This consideration applies to The ICCPR and ACHPR, which are also applicable in our jurisdiction, because they were duly domesticated through the constitutional process of ratification, pursuant to Subsection (4) of section 40 of the Constitution of Sierra Leone, Act N0.6 of 1991.

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obligations, which the courts are bound to enforce. By adjectival law, I mean the rules of evidence and procedure, pursuant to which the substantive law is enforced[2].

1.4.2 Audi Alteram Partem: A Sacred Constitutional Principle of Natural Justice.

The audi alteram partem rule is tinsel as a principle of natural justice. The dispensation of justice by every adjudicating authority is inter alia congruent with this principle. This is simply because, it provides adjudicating authorities with an opportunity to hear the other side, to guide it to make decisions that are just, fair and reasonable in every circumstance. Adjudicating authorities will never be able to do this, if this principle is not accorded the recognition and sanctity it deserves, in deciding cases. In the instant case the Judgement that is contended is procedural. It is not based on any form of substantive justice. Therefore, prima facie, there is every need for the Defendants/Applicants to be heard. The question that is to be asked at this stage, is whether the Defendants/Applicants were given an ample or adequate opportunity to be beard, prior to the determination of the very application that culminated in the order of 16th February, 2021. This question is necessitated, by paragraphs 4 and 5 of the affidavit in support thereof, which raised the points that the Defendants/Applicants' Solicitors entered appearance (see Exhibit JMK2) and had even filed a defence, which was inadvertently (as a result of an administrative lapse) not entered in the Registry's Book (see Exhibit JMF3).

On the basis of the appearance entered, it would have been prudent and procedurally apposite, for the processes that culminated in the order of 16th February 2021, to have been served on the other side. There is nothing in evidence confuting this fact. However, Y. M. Kamara Esq., argued contrariwise that the Defendants/Applicants had sufficient notice that the motion for a default judgment was to be moved and heard by this Honourable Court. Thus, Counsel further referenced Exhibit YMK2, which is a notice of hearing, dated 29th January 2021; and also stated that Counsel on the side, failed to attach evidence of receipt of the payment in respect of the defence to their affidavit. Even though these have appeared to have been very genuine concerns, they are not sufficiently legal to negate the procedural essence of personal or substituted service of court processes. Again, such protestations, are not sufficient enough to repudiate the

[2] This clarification is necessitated by the complexities of the issues, which are to be determined in this application.

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audi alteram partem rule. Essentially, on this point, I will conclude that there is nothing of evidential value sufficient enough to prevent the Defendants/Applicants from invoking the audi alteram partem rule. Therefore, in every circumstance in which default judgements are obtained; and there is evidence that the parties, against whom such judgements are taken, were not served with the necessary and appropriate processes, leading to such default judgements; the courts are thus compelled, by the foregoing constitutional rule, to set such judgement aside, so that the affected parties can be heard.

1.4.5 The Position of the Courts in Setting Default Judgements Aside.

Moreover, nothing precludes the courts in setting defaults judgements aside, even in circumstances wherein processes are served on defendants, who could neither enter appearance; nor file defence and counterclaims, within the timeframe prescribed in The HCR, 2007. The general procedural rule is that any default judgement, whether it is regularly or irregularly obtained, can be set aside. Nonetheless, are there exceptions to this general rule? This leads me to the second question, which touches and concerns the position of the law in circumstances, wherein default judgments are obtained in contradistinction to any rule of law. The courts are bound to give effect to any rule of law, which existence is sanctioned by the rules of recognition[3] of any legal system; irrespective of whether the rule concerns the substantive or adjectival law. Moreover, procedurally, proceedings that are done by default, must strictly be conducted in accordance with the rules of evidence and procedure. This principle of adjectival law is bolstered by Buckley, L.J. in Hamp-Adams **v.** Hall (1911) 2 K.B 94, when he stated... 'where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; this is a matter of strictissimi juris'.

Undeniably, there are a plethora of authorities in Sierra Leone's adjectival law that are a clear reflection or manifestation of the above rule[4]. Thus, regular default judgements may be deemed irregular, when the parties obtaining them, consciously or unconsciously, fail to comply strictly with the procedures, as prescribed by the rules. Which procedural rules that were impugned, during the

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[3] See H. L. A Hart's Concept of law 1961, for an analysis of the rules of recognition of a legal system.

[4] The cases of SLOF **v.** P.B. Pyne-Bailey (10th May, 1974), Yemen Company Limited **v.** Wilkins (1950- 1956) ALR S.L Series (Civil Case NO. 193/54) pages 377- 388, Alexander Kora Film Production Ltd. **v.** Columbia Pictures Corp. Ltd., (1946) All E. R. 424 etc. are clearly instructive on this rule.

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proceedings, leading to the order that is sought to be set aside? The only issue that is cognate with procedural incongruity (which I will dub a slip not an error), is the fact that the Defendants/Applicants' Counsel, was not served with the appropriate processes, that culminated in the order of 16th February, 2021. And personal or substituted service is a sine qua none in civil litigation. Thus, how can the other side to a litigation know about the stage which any civil matter has journeyed into, if they are not served with the requisite processes, depicting that stage of the proceedings? Further, the other issue, which is raised by Elvis Kargbo Esq., in the arguments, is the need for this matter to proceed to trial. This issue is rationalised in the fact that Exhibit JMK5, depicts the content of a title deed, which is in the name of the Defendants/Applicants. Thus, in a circumstance, where there are competing title deeds in respect of the same res (realty), it would be legally inappropriate to give credence to a default judgement, against one contesting party; without examining, which of the parties has really established a good root of title. And pursuant to the monumental decision, in **Seymour Wilson v. Musa Abbess (Supreme Court Civ. App. 5/79),** it is incumbent on any party to a civil litigation, regarding declaration of title to property, to rely on the strength of their case as opposed to the weakness of the other person's case. In principle and effect, this can only be seen done, when evidence is accordingly elicited from, competent and compellable witnesses, in a fair and transparent trial, conducted by a reasonable tribunal facts or a court of competent jurisdiction (in this context, the High Court of Justice of the Republic of Sierra Leone). On the compellable weight of this indefatigable authority in the Sierra Legal system, it would be unjust, unfair and unreasonable, should this court forestall the processes, leading to the progression of this matter to trial.

Moreover, one other point, which Y. M Kamara Esq. raised (which was controverted by Elvis Kargbo Esq.) is the submission that the Plaintiffs/Defendants' title deed pre-dates that of the other side. To this point, I must state that because it goes to the root of the first relief, which is being sought by the Plaintiffs/Respondents, it would be pre-mature to examine that issue at this stage. It is indubitably a triable issue, which can only be conscientiously determined should this matter proceed to trial. But for the edification of all and sundry, it is legally expedient to pinpoint that the authority[5] (architecture) on which that that line of reasoning was built, was

[5] See the case of Davies **v.** Bickersteth (1964- 1966) A. L.R. (S. L) 403.

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judiciously and judicially overturned and demolished in the immediately aforementioned celebrated case in our jurisdiction. Meanwhile, the penultimate point which I think I should not allow to fester unaddressed is the argumentation that the Defendants/Applicants do have a good and valid defence on the merit, which goodness and validity, can only be determined, pursuant to full-fledge trial. The seriousness of this point, is again rooted in the foregoing analysis. Meanwhile, it appears that the merit in this point is seen in **Paragraph 13/9/18 of the Supreme Court Annual Practice under the rubric Discretionary Powers of the Court**. The paragraph thus reads:

> **'The power of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law, but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and because if the defendant can show merits, the court will not prima facie desire to let a judgment which there has been no proper adjudication.'**

Finally, on the issue of consolidation, a perusal of both writ of summonses, alluded to in the affidavits (in support and opposition- supplemental) and the submissions of both Counsels, depicts that the res in both matters is the same and almost all the parties are the same. Therefore, an order to consolidate them, cannot under any circumstance contravene or circumvent the provisions in Order 4 of The HCR, 2007. Circumspectly, I will accordingly grant the second and third orders as prayed; I do not see any need to grant any other order that is not specifically prayed for in the application that is being determined. Simultaneously, I will order that the cost of this application, shall be borne by the Defendants/Applicants themselves.

28/6/2021

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

Justice of the Superior Court of Judicature of the Republic of

Sierra Leone.

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