CC 301/15 2018 D N0. 47

Between:-

Muru Brima Dumbuya- Plaintiff/Applicant

N0. 32 Pike Street

Brookfields

Freetown

And

Salie Mahoi- Defendant/Respondent

N0. 32 Pike Street

Brookfields

Freetown

Counsels:

Ibrahim I. Mansaray Esq. for the Plaintiff/Applicant

Augustine S. Marrah Esq. for the Defendant/Respondent

Ruling on an Application for a Summary Judgement, Relating to a Declaration of Title to Property, Recovery of Possession and an Injunctive Relief, Delivered on Tuesday, 3rd March, 2020 by Hon. Dr. Justice Abou B. M. Binneh-Kamara.

1. 0 Introduction

This ruling is predicated on an application made by Fornah-Sesay, Cummings, Showers and Co., pursuant to a Judge's Summons, dated the 11th January, 2019. The Judge's Summons is bolstered by the requisite affidavit of the Plaintiff/Applicant herein (Muru Brima Dumbuya) sworn to and dated the 11th January, 2019, together with the exhibits attached thereto and filled herewith. Essentially, the application is made, pursuant to Rules 1, 2 and 3 of Order 16 of the High Court Rules, 2007, Constitutional Instrument N0. 25 of 2007 (hereinafter referred to as the High Court Rules, 2007).

The principal thrust of the aforementioned Judge's Summons is underpinned by three unequivocal orders, which Ibrahim I. Mansaray Esq. believes that this Honourable Court should grant, because of the extent to which the peculiarity of its facts, resonate with the legal compass of Order 16 of the High Court Rules, 2007. Consequently, Augustine S. Marrah Esq., of KMS Solicitors, filled in an affidavit in opposition, sworn to by Salie Mahoi (the Defendant/Respondent) and dated 20th March, 2019, in justification of his conviction that this

Honourable Court, should not under any circumstance, grant the application. For purposes of clarity, this Honourable Court therefore considers it rationally expedient, to sequentially set out the Orders as prayed, on the face of the Jude's Summons alluded to above:

1. That Judgement be entered for the Plaintiff/Applicant herein against the Defendant/Respondent, pursuant to Order 16 Rule 1 and Rule 3 (1) of the High Court Rules, 2007, for the reliefs prayed for in this action as endorsed in the writ of summons to wit:
   a. A declaration that the Plaintiff is the owner and person entitled to possession of all those properties situate, lying and being at NOs.32 and 32A Pike Street, Brookfields, Freetown, in the Western Area of the Republic of Sierra Leone, as delineated and described on Survey Plan L.S 267/03 dated 18th July, 2003, attached to a Statutory Declaration, dated 8th September, 2003 and duly registered as NO. 62/2003 at page 44, in Volume 48, of the Record Books of Conveyances kept in the Office of the Administrator and Registrar General in Freetown.
   b. Immediate recovery of possession of the said properties situate, lying and being at NOs. 32 and 32A, Pike Street, Brookfields, Freetown, in the Western Area aforesaid measuring an Area of 0. 2282 Acre.

c. A perpetual injunction restraining the Defendant, whether by himself, his servants, agents, privies, workmen or howsoever called from entering upon or remaining on the said properties or any portion thereof, or interfering with the Plaintiff's use and enjoyment of the said properties or from deposing of the said properties or any portion thereof, in any way whatsoever and by any reason whatsoever.

2. Any further Order (s) that this Honourable Court may deem fit and just in the circumstances.
3. Costs

1.1 The Arguments of Counsel for the Plaintiff/Applicant.

Meanwhile, on the 12th March, 2019, Ibrahim I. Mansaray Esq., moved this Honourable Court on the contents of the aforesaid Judge's Summons, whilst alluding to the requisite affidavit, that is strengthened with four (4) exhibits, marked MDB1 through 4, attached thereto. The following legal propositions, underscored the central argumentations of Counsel:

1. The sole test that a Plaintiff must pass for an order of Summary Judgement to be entered in his favour is for him/her to establish that the Defendant's defense raises no triable issue. Unarguably,

paragraph 7 through 9 of the affidavit in opposition, incisively depict that the Defendant's defense in this action is a sham and no court of competent jurisdiction, can give credence to such facts as deposed to in the said affidavit. The said defense is purposefully, contrived to impede (frustrate) the ends of justice. In fact, Exhibit MDB1, confirms that the Plaintiff is the fee simple owner and the person that is entitled to possession of the property.

2. The entire affidavit in opposition merely contains averments that are evidentially unsubstantiated. Counsel singled out Paragraph 4 of the affidavit and stated that it only indicated that the property at No. 32 Pyke Street is owned by his mother. Counsel noted that there is no evidence attached to the affidavit in justification of that submission.
3. The Defendant/Respondent claimed that the property at N0. 32A Pyke Street, was owned by the Plaintiff's/Applicant's parents and his mother, but that averment is completely unsubstantiated. Counsel alluded to Paragraph 5 of the same affidavit, in which the Defendant/Respondent claimed he is the son and attorney of the sister of the Plaintiff/Applicant. There is no evidence by way of a birth certificate or a Power of Attorney in support of that averment. The absence of any piece of evidence to support the averments in Paragraphs 4 and 5 of the affidavit in opposition is indicative of the

fact that the Defendant/Respondent merely contrived a defense that raised no triable issue.

4. Counsel alluded to Paragraph 3 of the affidavit in support of the application, exhibiting the Statutory Declaration dated the 8th September, 2003, which effectively support his client's averment that he is the fee simple owner of the properties in contention (NOS. 32 and 32A Pyke Street, Freetown). See the locus classicus of Seymour Wilson v Musa Abbess S. C Civ. App. NO. 5/79.

Unarguably, it is quite clear from the above submissions that Point 2 through 4, are a repetition of the seemingly overwhelming argument, already canvassed in Point 1. However, in the analysis leading to the determination of the aforementioned application, I will deal with all four points conjointly, as they are not mutually exclusive.

1. 2 <u>The Arguments of Counsel for the Defendant/Respondent.</u>

Contrariwise, Augustine Marrah Esq., referenced the aforesaid affidavit in opposition, which he said was filed, pursuant to Rules 3, 4 and 7 of Order 16 of the High Court Rules, 2007, to support the undermentioned argumentations:

1. The subject of this action belongs to the Estate of the Plaintiff's father, Brima Dumbuya. And that property is numbered 32A Pyke

Street, Freetown. Hence, the Plaintiff's appropriation of it is unlawful/illegal.

2. That the property numbered 32 Pyke Street, Freetown, as a matter of fact, is the sole and exclusive property of the Defendant's/Respondent's mother (Mrs. Mary Mahoi).
3. The instrument on which the Plaintiff/Applicant relies on to solidify this application is a statutory declaration (Exhibit MBD1). A statutory declaration does not confer any title. The property is in the heart of Freetown. And Exhibit MBD1 was only executed in 2003.
4. The validity and legality of Exhibit MBD1 is being challenged in the Defense and counter-claims, filled herein and dubbed Exhibit MBD4, which contain two other paragraphs, seeking for the declaration of both properties alluded to in that Exhibit.
5. The threshold for the award of Order 16 in favour of the Plaintiff/Applicant, has not been met. Their papers have not shown that the Defendant/Respondent does not have any defense on the merit. Apart from Exhibit MBD1, which is being contested, all the other exhibits are pleadings. Counsel referenced Paragraph 163 of the White Book, relating to Order 14 therein.
6. Finally, Counsel submits on the basis of the affidavit in opposition, which contains facts, contesting the facts in the affidavit in support,

those facts of the affidavit in opposition, do contain the defense. Essentially, the instrument on which the Plaintiff/Applicant, relies to make a case is now being impugned. Counsel urged that the application, should be dismissed with substantial cost.

Again, unarguably, it is quite clear from the above submissions that Point 4 through 6, are a repetition of the protestations, already canvassed in Point 3. However, in the analysis leading to the determination of the aforementioned application, I will deal with all six (6) conjointly, as there is only one central idea connecting them.

1. 3 Approach/Method Leading to the Determination of the Application The.

Meanwhile, I shall first review the existing legal literature (embedded in case law and other pertinent legal authorities), alongside the requisite statutory provisions, as a guide, to assess how the Superior Court of judicature, has been exercising its jurisdiction in making orders, relative to summary Judgements. Secondly, I shall adopt an elliptical approach by juxtaposing the arguments of both Counsels, to address their individual concerns; regarding why the order of a Summary Judgement, which is the principal thrust of this application, should or should not be granted. Thirdly, I will eventually determine whether in the context of this application, it is legally and rationally expedient, to grant or not to grant

the orders, as prayed for on the face of the aforementioned Judge's Summons.

However, before proceeding with any of the foregoing tasks, let me hasten to state that my reading of the papers, inter alia, depicts that the application, factually dovetails with the provisions of Sub rule (2) of Rule 1 of Order 16. And that the affidavit that bolstered the application is also undoubtedly chimed with the provisions of Sub rules (1) and (2) of Rule 4 of Order 16. Essentially, there is no issue of procedural incongruity to grapple with (prior to) the determination of this application.

1.4 A Review of the Existing Legal Literature on Summary Judgements.

Circumspectly, the authors of the Supreme Court Annual Practice of 1999 (The White Book), which contains a detailed analysis of the High Court Rules of Sierra Leone, 2007, clearly articulated the legal significance of Summary Judgements in their analysis between pages 162 and 199. Their pontification in paragraph 14/1/2 in page 163 is so pertinent to the Court's jurisdiction in its determination of applications on Summary Judgements, that I feel obligated to replicate it here:

> The scope of Order 14 *(Order 16 in the High Court Rules, 2007, my emphasis in italics)* proceedings is determined by the rules and the Court has no wider powers than those conferred by the rules, nor any other statutory power to act outside and

beyond the rules or any residual or inherent jurisdiction where it is just to do so.

Thus, in tandem with the foregoing, my consideration to grant or not to grant the orders, will be entirely underpinned by the provisions of Order 16 of the High Court Rules, 2007; as opposed to any other consideration that may appear just, fair and reasonable to either of the parties to the application. Purposefully, the beauty of Order 16 is to enable the Plaintiff/Applicant to expeditiously obtain a Judgement in a circumstance, wherein there is certainly and plainly no defense to negate his/her claim(s).

Furthermore, Summary Judgement can still be entered in favour of the Plaintiff, even in circumstances, wherein the Defendant's defenses, are predicated on an ill-conceived point of law. The Court's decisions in the cases of C. E Health PLC v Ceram Holding Co. (1988) 1 WLR 1219 at 1228; (1989) 1 ALL E.R 203, at 210, Home v Overseas Insurance Co. (1990)1 WLR 153-158, are quite instructive on this realm of procedural justice. Significantly, my reading of Rule 1 through 3 of Order 16, depicts the following conditions precedent that should be met, for an order of Summary Judgement to be entered in favour of the Plaintiff/Applicant:

1. The defendant must have given a notice of intention to defend
2. The Statement of Claim must have been served on the Defendant

3. The affidavit in support of the application must comply with Rule 2 of Order 16.

Analytically, regarding the first conditionality, Exhibit MBD3, confirms that the Defendant's/Respondent's Solicitors, accordingly entered appearance to this action on her behalf. And this is accordingly seen in both the Memorandum of Appearance entered and the Notice of Appearance entered by KMK Solicitors on the 15th November, 2018. Moreover, the facts deposed to in the affidavit in opposition, collectively points to the Defendant's/Respondent's willingness to defend this action.

This inferential conclusion is seemingly factually strengthened by the Defendant's/Respondent's Defense and Counterclaim, dated 7th December, 2018, which was duly served on the Solicitors for the Plaintiff/Applicant. Thus, the notice of intention to defend this action, was even made known, when the Defendant/Respondent, acknowledged service of the writ; and stated in the acknowledgement that he intended to contest the action.

Further, having regard to the second criterion, ExhibitMBD2, which is the Writ of Summons, commencing this action, incisively contains the Statement of the Plaintiff's/Applicant's Claims. This confirms the fact that the Statement of Claims has been appositely served on the

Defendant/Respondent in this action; as there is an affidavit of service in the file. In fact, in this case, the Statement of Claims is indorsed with the Writ of Summons, dated 8th November, 2018. Thus, it is neither served with it, nor immediately after the service of it; though either of the foregoing latter situations, meets the threshold of the second criterion. Meanwhile, consonant with the final criterion, the affidavit in support of the application, indubitably acknowledges a statement of the deponent's belief that there is indeed no defense to his claim (see paragraphs 9 and 10 of the affidavit that bolstered the application).

Procedurally, having established that the foregoing criteria have been accordingly complied with, a prima facie case can thus be made, for an order of Summary Judgement to be entered in favour of the Plaintiff/Applicant. However, Sub rule (1) of Rule 3 of the same Order 16, imposes a clear evidential burden on the Defendant/Respondent to prove to the Court that there is an issue or question in dispute, which ought to be tried, or there ought for some other reason to be a trial.

1. **5 Contextualizing the Arguments of Counsels to Determine the Application.**

Analytically, the principal thrust of the contention in this matter, having regard to the affidavits (in support and in opposition), and the exhibits attached thereto, is about ownership of all those properties situate, lying and being at NOs. 32 and 32A Pike Street, Brookfields, Freetown, in the Western Area of the Republic of Sierra Leone, as delineated and described on Survey Plan L.S 267/03 dated 18th July, 2003, attached to a Statutory Declaration, dated 8th September, 2003 and duly registered as NO. 62/2003 at page 44, in Volume 48, of the Record Books of Conveyances kept in the Office of the Administrator and Registrar General in Freetown.

The Plaintiff/Applicant has produced a documentary evidence (see Exhibit MBD1), a Statutory Declaration, in justification of his assertion that the Defendant/Respondent does not own the realty in question, but rather it belongs to him. The Defendant/ Respondent on the other hand, has not relied on any documentary evidence, but paragraph 11 through 18 of his Counterclaim, alleges a possessory title of the properties for which this action is instituted. However, does his so-called possessory title, meet the forty-five (45) years threshold, established in the case of Swill v Caramba-Coker (Civ. App. NO. 5/71)? There is absolutely nothing

of evidential value before this Honourable Court that should warrant any affirmative answer to the foregoing question. Again, the question cannot be answered at this stage, because the onus to prove that the Defendant/Respondent has been in possession for such period, would come from the evidence, should this matter proceed to trial.

Nevertheless, there are a number of questions to be raised at this stage; in a bid to determine whether there are issues or questions in dispute, which ought to be tried; or whether there ought for some other reason (s), to be a trial. This is the central thematic construct of the provision of Sub rule (1) of Rule 3 of Order 16, which is germane to the determination of this application. The answers to the following questions, will certainly guide this Honourable Court, to discern the concerns, raised in Sub rule (1) of Rule 3 of Order 16, in tandem with the facts in issue relevant to this application:

1. Does the mere registration of an instrument, pursuant to Section 4 of Cap. 256 of the Laws of Sierra Leone, 1960 (as amended), ipso facto, confer title to that holder of the registered instrument (in this case the Statutory Instrument referenced above)?
2. Does Cap. 256, pursuant to which ExhibitMBD1 is registered, deal with registration of title?

3. Does reliance on possessory title constitute a defense to an action, in a circumstance, wherein the other side relies on a registered instrument (Statutory Declaration)?

Meanwhile, I will proceed by answering the first question in the negative; and simultaneously provide the requisite succour for this position, with a notable quotation from Livesey Luke, C. J., in the celebrated case of Seymour Wilson v Musa Abbess (Civ. App. 5/79), which is alluded to by both Counsels in justifications of their submissions:

> Registration of an instrument under the Act *(Cap. 256, my emphasis in italics)* does not confer title on the purchaser, lessee or mortgagee etc., nor does it render the title of the purchaser indefeasible. What confers title (if at all) in such a situation is the instrument itself and not the registration thereof. So the fact that a conveyance is registered does not ipso facto mean that the purchaser thereby has a good title to the land conveyed. In fact the conveyance may convey no title at all *(my emphasis)*.

Moreover, I will also answer the second question in the negative. Thus, the short title to Cap.256 (as amended) reads 'An ordinance to Amend and Consolidate the Law Relating to the Registration of Instruments'. So, it is indisputable that the purports of the statute is about 'registration of

instruments' and not 'registration of title'. Unarguably, there is no provision in its thirty-one (31) sections and three (3) schedules that deals with registration of title. Livesey Luke C.J., further espoused the fundamental distinction between 'registration of instrument' and 'registration of title', by reference to the position in England, and with a clearly articulated thought experiment, rationalised between pages 74 and 81 of his analysis. The following are the segment of his analysis, which can be quickly and elliptically put into context in a bid to determine the application:

> '... it should be abundantly clear that there is a fundamental and important difference between registration of instruments and registration of title. Cap 256 does not provide for, nor does it pretend to contemplate, the registration of title. It states quite clearly in the long title that it was passed to provide for the registration of instruments (see page 76)
>
> '...the mere registration of an instrument does not confer title to the land effected on the purchaser etc. unless the vendor had title to pass or had authority to execute on behalf of the true owner, nor does it thereby render the title of the purchaser indefeasible'(page 78).

Analytically, the third question undoubtedly resonates with the determination of the issues, contemplated in Sub rule (1) of Rule 3 of Order 16, in relation to the facts in issue, which underscored the application. In variably, according to the said Sub rule, when a court of competent jurisdiction, establishes that there are issues or questions in dispute, which ought to be tried; or there ought for some other reason (s), to be a trial, it frowns at making an order of Summary Judgement in favour of the Plaintiff/Applicant.

Contextually, it is the responsibility of this Honourable Court to determine whether the mere reliance on a 'possessory title' constitutes a defense to an action, in a circumstance, wherein the other side relies on a registered instrument (in this case a Statutory Declaration). Essentially, the Courts decisions in Cole v Cummings (NO. 2) (1964-66) ALR S/L Series page 164, Mansaray v Williams (1968-69) ALR S/L Series page 326, John and Macauley v Stafford and Others S. L Sup. Court Civ. Appeal 1/75, are very much indicative of the circumstances in which Judgements have been entered in favour of owners of possessory titles, in even instances wherein their contenders, were holders of registered conveyances. This position is also satisfactorily bolstered by Livesey Luke C. J., in Seymour Wilson v Musa Abbess (see page 79):

> I think it is necessary to point out that until 1964, registration of instruments was not compulsory in Sierra Leone. It was the Registration of Instruments (Amendment) Act, 1964 that made registration of instruments compulsory. So there are possibly hundreds of pre-1964 unregistered conveyances... It would mean that any person taking a conveyance to a piece of land after 1964 from a person having no title to the land and duly registering the conveyance would automatically have title to the land against the true owner holding an unregistered pre-1964 conveyance. The legislature would not have intended such absurd consequences.

Significantly, in tandem with the foregoing analysis, it cannot be concluded that Exhibit MBD1 (the Statutory Declaration that Counsel for the Plaintiff/Applicant has relied on) is sufficient enough to negate Counsel for the Defendant's/Respondent's protestation that this matter should proceed to trial. The main contention in this matter is simply about ownership of realties numbered 32 and 32A Pyke Street, Freetown, which are being claimed by both the Plaintiff/Applicant and the Defendant/Respondent. This Honourable Court is of the conviction that this contention can only be judiciously resolved, when a full-blown trial is expeditiously conducted.

Furthermore, in as much as I will not accede to the submission of Counsel for the Plaintiff/Applicant that there are no triable issues in this matter, I will simultaneously not lend succour to Counsel for the Defendant's/Respondent's submission that the application is ill-suited, and does not dovetail with the spirits and intendments of Order 16. However, having regard to the affidavit in support of the application and the exhibits attached thereto, it does not appear to this Honourable Court that Counsel for the Plaintiff/Applicant knew that the Defendant/Respondent, relied on a contention, which would entitle his client to an unconditional leave to defend.

Against this backdrop, I am not inclined to impose any cost on Counsel for the Plaintiff/Applicant for this application. Invariably, the provision in Sub rule (1) of Rule 7 of Order 16, which underpinned the request for cost is one that is practically directory, but not mandatory. Finally, in consideration of the foregoing analysis, I will thus invoke the provisions in Sub rule (3) of Rule 4 and Paragraph (a) of Rule 6 of Order 16, and the proviso thereto, to make the following orders:

1. That the Defendant/Respondent is hereby granted leave to defend this action on the condition that he provides a security for cost of fifty- million Leones (Le 50, 000, 000) to be paid into the Judicial Sub-treasury, within twenty-one (21) days after this order.

2. That Counsel for the Defendant/Respondent shall produce documentary evidence of payment of the said sum by way of a receipt, acknowledging same; and the said receipt shall be filled, exhibited or attached to an affidavit.
3. That the reply and defense to the counterclaim (if any) to be filed within seven (7) days after this order.
4. That the parties shall exchange copies of documents within seven (7) days after this order.
5. That the parties shall exchange copies of documents they would wish to duly tender at the trial ten (10) days after this order.
6. That the parties shall exchange witnesses statements not later than twenty-one (21) days from the date of this order.
7. That within fourteen (14) within days from the date this matter is set down for the trial the Defendant/Respondent shall identify to the Plaintiff/Applicant those documents which she would want to include in the bundle to be produced to the Court, pursuant to Sub rule (2) of Rule 9 of Order 40 of the High Court Rules, 2007.
8. That not later than seven (7) days to the date fixed for trial the Plaintiff shall provide for the Court two (2) bundles, comprising the following documents as per Sub rule (2) of Rule 9 of Order 40 of the High Court Rules, 2007 to wit:

   a. Pleadings and any amendments thereto.

b. Admission of facts if any.

c. The nature of the evidence to be relied on (documentary or oral) and this shall include any piece of evidence agreed upon.

d. The documents that are central to each party's case, which that party would want to include in the bundle.

e. The lists of witnesses and the witnesses' statements exchanged between them.

f. A survey of the propositions of law to be relied upon and the lists of authorities to be cited.

g. The chronology of relevant facts.

h. That the date for the trial of this action is fixed for Tuesday, 31st March, 2020.

i. Liberty to restore summons for further directions.

j. Matter is adjourned to Monday, 30th March, 2020.

k. Costs in the cause.

I so order.

Hon. Dr. Justice A. B. M. Binneh-Kamara, J.