Misc. App. 388/15 C. N0. 22

In the High Court of Sierra Leone

(Family and Probate Division)

Between:

Patrick Albert Cole - 1st Plaintiff/Respondent.

Administrator of the Estate of

Salieu A Cole (Suing by his Attorney

Jacqueline Caulker)

Jacqueline Caulker - 2nd Plaintiff/Respondent.

N0. Beckley Lane (Time Square)

Tengbeh Town

Desmond Cole - 3rd Plaintiff/Respondent.

14 Freetown Road

Freetown

And

Isha Cole - 1st Defendant/Applicant.

N0.1 Rok Street

Funkia

Goderich

Mariama Kanu - **2nd Defendant/Applicant.**

Mr. Mohamed Jalloh - **3rd Defendant/Respondent/**

N0. 1 Leomy Lane **(Interested Party)**

Off Benjamin Lane

Freetown

Counsels:

E. T. Koroma Esq. for the 2nd Defendant/Applicant.

K. Lisk Esq. for the Plaintiffs/Respondents.

D. R. Pratt Esq. for the Interested Party.

Ruling on an Application for an Interim Stay of Execution of the Judgement, dated 17th December, 2015 and for same, being a Default Judgement, to be Set Aside for Fatal Irregularities, Delivered by The Hon. Dr. Justice A.B.M. Binneh-Kamara on Monday, 1st March, 2021.

1.0 Background.

The foregoing application was made to This Honourable Court by Emmanuel Teddy Koroma, Esq. (hereinafter referred to as Counsel for The Applicant) of Digital Chambers, on Thursday, 11th April, 2019. Procedurally, the application is made by a notice of motion; and it is

bolstered by the affidavit of Mariatu Kanu (Nee Sesay Cole) of N0. 14 Freetown Road, Freetown, who happens to be the 2nd Defendant/Applicant (hereinafter referred to as The Applicant). The said affidavit is also dated Thursday, 11th April, 2019. The application is underpinned by five specific orders, which Counsel for The Applicant, wants this Honourable Court to grant.

Meanwhile, K. M. Lisk Esq. (hereinafter referred as Counsel for The Respondents), did not file any affidavit in opposition, for reasons that are clearly stated 1.1.2 below. Nonetheless, he rather filed an application, for contempt against The Applicant, in tandem with the provisions of Order 51 of the High Court Rules, 2007, Constitutional Instrument N0. 25 of 2007 (hereinafter referred to as The HCR, 2007). Paradoxically, although he had addressed on the elaborate contents of the contempt proceedings, seeking to send The Applicant to prison for conspicuously impugning and violating the court's order of 17th December, 2015, he also surprisingly abandoned it; and 'frankly' conceded to Counsel for The Applicant's submissions, regarding the application of Thursday, 11th April, 2019.

However, D. R. Pratt Esq., (hereinafter referred to as Counsel for The Interested Party) of Sufian-Kargbo, Pratt and Co., filed a notice of appearance and a memorandum of appearance entered, on 26th

February, 2019, on behalf Mr. Mohamed Jalloh (hereinafter referred to as The Interested Party). Nonetheless, Counsel for The Applicant, opposed the appearance; and regarded it as a procedural chicanery, noting that nothing precludes any juristic/juridical person, from making the appropriate application to be included as a party to any action, by invoking the right procedure.

Meanwhile, This Honourable Court, on 11th June, 2019, upheld the objection and directed that the apposite provisions in The HCR, 2007, be invoked should Mr. Mohamed Jalloh, be made an Interested Party to this action. Moreover, the said person thus became an Interested Party to this action, pursuant to This Honourable Court's order of 18th February, 2020.The order further directed, pursuant to Order 12 of The HCR, 2007, that he should enter appearance within fourteen (14) days, and file an affidavit in opposition to the application of 11th April, 2019.

Essentially, the foregoing order was accordingly complied with; and an affidavit in opposition to the affidavit of the notice of motion of 11th April, 2019, was accordingly filed by Counsel for the Interested Party. This is the peculiar circumstances that culminated in the hearing of the aforementioned application that is to be surely determined in this ruling. It should be noted that when Counsel for the Applicant, addressed This Honourable Court, on the contents of his notice of motion and affidavit

in support thereof, he made no allusion to any provisions in The HCR, 2007, but he however referenced some salient cases, which have become monumental in our jurisdiction, when considering whether or not applications for stay of execution, should or should not be granted. Alas! I shall allude to those cases in the analysis, leading to the determination of this application.

1.1 <u>Critical Context.</u>

However, at this stage, it is rationally and legally expedient, for the arguments of particularly Counsels for The Applicant and The Interested Party, to be put into a critical context, for purposes of a clear analytical exposition in a bid to determine whether the application, should or should not be granted. Significantly, there is need to consider the submissions of Counsel for The Respondents, even though he has in no uncertain terms acceded to the application, which is about to be determined.

1.1.1 <u>The Arguments of Counsel for the Applicant.</u>

The following contentions are the principal arguments that underscore, the submissions of Counsel for The Applicant, relative to why he thinks the application of Thursday, 11th April, 2019, should be granted:

1. The affidavit of Mariatu Nee Sesay-Cole, sworn to on the foregoing date, contains four (4) exhibits, marked 'Exhibit MSC 1-4'. Exhibit

MSC 1, is a copy of the originating summons (OS), pursuant to which this action was commenced. The OS is dated 29th September, 2015, and it is strengthened by the affidavit of Jacqueline Caulker (The 2nd Respondent). Exhibits MSC 2, encompasses a copy of the contested Power of Attorney and a copy of the Letters of Administration that are as well in contention. Exhibit MSC 3, is a copy of the judgement in default of appearance, which Counsel for The Applicant, has come to set aside. Exhibits 4, encapsulates, a writ of summons, taken out by The Interested Party; and the order of The Hon. Justice A. Showers, JA (as she then was), dated 17th December, 2015. Counsel contends that the aforementioned are exhibited in a bid to point out the fact that the foregoing Judgement, was irregularly obtained.

2. That the affidavit in support of the application, is loaded with all the apposite facts, particularly those found between paragraphs 6-19, in justification of the submission that the processes, leading to the default judgement, were clearly irregular.
3. That the OS commencing this action is defective; and therefore whatever order that emanates from it, is considered null and void and therefore of no legal effect.
4. Counsel unpicked the contents of Exhibit MSC2, which is the Power of Attorney that touches The Respondent's capacity to institute this

action. The said legal instrument, was purportedly issued by the 1st Respondent, on behalf of The 2nd Respondent, to commence this action. Counsel asserts that the instrument is void in content, because its date of registration, predated the date of its notarization. Thus, the power of attorney, is dated 18th November, 2014; it was registered in 2015, without any court order. And this happened one year after it was prepared.

5. That Exhibit MSC 4, does not reflect the true value of the estate of the intestate deceased, whose estate has not been accordingly administered.
6. That the said processes, notwithstanding their material defects, were not personally served on The Applicant, as provided by the rules. Even the OS was as well not personally served. So, the failure of The Applicant to file the requisite papers in opposition to the application that culminated in the order of 17th December, 2015, was neither deliberate, nor occasioned as a result of any disrespect for This Honourable Court. But, it should be interpreted as no fault of his, because he had no knowledge about the proceedings.
7. In fact, ever after the default judgement had been obtained, it was never served on The Applicant and the other Defendants. In effect, they had no notice that a default judgement, had been taken out against them.

8. In view of the foregoing, it is Counsel's submission, that the aforesaid judgement, is irregular and should be set aside, alongside every other subsequent proceedings that emanated from it. Alternatively, Counsel argues that assuming This Honourable Court, dispenses with the foregoing overwhelmingly overt irregularities, the interest of justice should supersede, any failure to abide by time limit. Further, the interest of justice should not be defeated by any failure on the part of The Applicant to have entered an appearance. See the following authorities that are quite instructive on this point: Day **v.** RAC Motoring Services Limited (1999), 1 All ER at page 1007, The Saudi Eagle Case (1986), 2 Lloyd's Report at page 22; this precedent was upheld in Evans **v.** Berthlam.

1.1.2 <u>The Submissions of Counsel for the Respondents.</u>

The salient points in The Respondents' Counsel's submissions are catalogued thus:

1. That the Power of Attorney (Exhibit MSC II), pursuant to which this action, was originally commenced, is defective; and that as an officer of the court, he would not raise any contention to the application, as he considered the irregularities, raised in the notice of motion of 11th April, 2019, to be fatal and certainly incurable.

That Exhibit MSC II, which is crucial to this action, contains serious defects; which no officer of the court will turn a blind eye to.

2. Consequent on the foregoing submission, he would not continue with the contempt proceedings, which he had commenced against The Applicant, pursuant to a notice of motion dated 7th March, 2018, supported by the requisite affidavit, sworn to by one Joseph Kapuwa of BMT Chambers.

Nevertheless, what has really appeared amusing and even bemusing, is why should Counsel for The Respondents, who really obtained the order of 17th December, 2015, pursuant to which The Interested Party, subsequently became a party to this action, is now conceding to an application to set aside that very order, which culminated in the subsequent proceedings that resulted in a sale by the same court order, which he now wishes to be set aside? Of course, that must have come as an afterthought for some reason (s) unknown to this Bench.

1.1.3 <u>The Arguments of Counsel for the Interested Party.</u>

The arguments of Counsel for the Interested Party, concerning why he thinks the orders prayed for in the application of Thursday, 11th April, 2019, should not be granted, are summarised as follows:

1. The affidavit in opposition to the aforementioned application, is in clear contradiction of the affidavit supporting the application.

Counsel thus relies on the entirety of that contradictory affidavit, which he believes, has set the records straight.

2. It is Counsel for The Respondents, who in 2015, applied for an order of the High Court of Justice to sale the realty in question; and for the proceeds to be shared between its beneficiaries. The High Court of Justice, presided over by The Hon. Mrs. Justice A. Showers, JA (as she then was), granted the order of sale of the realty at NO. 14 Freetown Road, Goderich.
3. The Interested Party, pursuant to the foregoing order, bought the property in 2018, as a bona fide purchaser for value; and a conveyance that is duly registered, in the Office of the Administrator and Registrar General, at Walpole Street, Freetown, pursuant to the Registration of Instrument Ordinance (Cap. 256), was executed in his name.
4. The application for the order of 17th December, 2015, to be set aside was filed three (3) years, after the order of sale had been made; and accordingly executed. And that the action, pursuant to which the order was granted, clearly complied with the provisions of The HCR, 2007. See Exhibit MJ I.
5. That the Interested Party, bought the property in accordance with the said court order.

6. The issue of capacity does not arise. Thus, at the time of the sale, there was a proper capacity, whether as Administrator or pursuant to the court's order. Thus, the party that seeks to dispute the transaction, leading to the sale, must prove that the purchaser, had notice of what he is now complaining of at this stage: see Camarah **v** Macauley {1920-1936} ALR SL Series Pages 150–153, Turay **v** Kamara and Jarrett {1968 - 69} ALR SL Series 89–94.
7. Even if the order is set aside, the sale and the conveyance to a bona fide purchaser for value is irrevocable; this principle thus accords The Interested Party a good title: see Gomez v S. L Housing National Fishing Company {2008} SLHC 12 (10 November, 2008).

2.0 **The Analytical Exposition.**

Thus, a clear deconstruction of the aforementioned arguments, depicts that a plethora of serious interwoven and complex principles and rules, embedded in the subsisting legal literature, enunciated in a plethora of decided cases, have to be contextualised, to fairly determine this seemingly thorny application. Essentially, I will sequentially unpick the issues, raised in the application and the respective affidavits (in support and opposition), in tandem with the rules and principles applicable thereto.

2.1 The Procedure.

My perusal of the papers, filed in connection with the application, establishes that the procedures adopted, are congruent with the appropriate provisions of The HCR, 2007. So, the proceedings were not underpinned by any manifest or demonstrable procedural irregularities. For example, the rule in Petty **v.** Daniel (1886), 34. Ch. D 172, born in the dictum of Kay, J. as enunciated by Kinsley J. in Yemen Company Limited **v.** Wilkins (1950 - 1956) ALR S. L Series (Civil Case NO. 193/54) page pages 377- 388 and by Romer J. in Alexander Korda Film Production Ltd. **v.** Columbia Pictures Corp. Ltd., (1946) 2 All E.R 424, that in circumstances, wherein notices of motion do not state the contents of the objections to be insisted upon, the Applicants, cannot rely on them, is undeniably complied with by The Applicant (see the notice of motion of 11th April, 2019).

This prima facie justifies, one of the reasons, why the said motion was evidently heard. Again, the said motion, was filed long after the order, which Counsel wants to set aside, was made. In effect, the motion was filed a little over three (3) years thereafter. This delay, might have literally constitute a sufficient ground, for the motion to be declared void and therefore of no legal effect. However, in circumstances, wherein clearly cogent and reasonable, explanations are given as to why motions

are lately filed, the courts are bound to hear them. This procedural truism is well articulated by Kingsley J. in Yemen Company Limited **v.** Wilkins (op. cit: 383).

In the instant case, The Applicant indeed deponed to some clearly articulated (though controversial) facts in justification of why, she was quite late in entering appearance and subsequently filing the motion of 11th April, 2019. But considering the seriousness of the facts, deponed to in her affidavit, one will adopt Kingsley J.'s position in the aforementioned case on affidavits in general. Thus:

> ...'an affidavit is not the sort of document with the accuracy of whose contents one should take the slightest risk'.

2.1.1 **The Evidential and Procedural Significance of Affidavits.**

However, what really seems procedural that I think I should clarify here concerns the very contents and purports of the affidavits; as filed. I reckon that in the affidavits, there are a plethora of serious legal arguments, calculated to skew the Court's decision in the determination of this application in favour of either side. However, an analysis of the position of The Respondents on this, is as impossible as it is either meaningless or needless, because their Counsel did not file any affidavit in opposition. Thus, solicitors must appreciate that affidavits, are neither a mechanism, pursuant to which legal issues are framed; neither are they

a vehicle, designed to tinsel legal opinions, which might be erroneously deemed factual.

Rather, they are meant to present the relevant facts and facts in issue, which will guide the courts in making fair, just, reasonable, and informed decisions, on applications that are brought to them for determination. Thus, the whole of Order 31 of The HCR, 2007, is undisputedly instructive on this point. Judicially, the Hon. Mr. Justice M. E. Tolla-Thompson, JSC., confirmed and articulated this point in Firetext International Co. Ltd. and Sierra Leone External Communications **v.** Sierra Leone Telecommunications Co. Ltd (Misc. App. 19/2002) (Unreported). Nevertheless, I shall now proceed to unpick the orders prayed for in the motion in tandem with the reason(s) justifying each of the prayers, embedded therein.

3.0 <u>Unpicking the Orders as Prayed.</u>

3.1. **<u>Default Judgment.</u>**

Undoubtedly, the order of 17th December, 2015, 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 other side, who now insists on their constitutional right (audi alteram partem) to be heard. The pleading of this constitutional principle at this stage of the proceedings is quite apt; bearing in mind that the order, which The

Applicant wants to set aside, culminated in an execution, resulting in the sale of the reality, which the Interested Party bought, pursuant to that court order, which now undeniably accords him a legal interest, which he now seeks to defend and protect, as an Interested Party; by relying on the principle of the bona fide purchaser for value without notice.

Thus, the interconnectedness of these facts, are inextricably linked to any fair and reasonable determination of the application in the interest of justice. Meanwhile, an analysis of the foregoing interwoven facts, raises a number of issues, which This Honourable Court must clarify, in tandem with the issues raised in the application's supporting affidavit, together with those embedded in the opposing affidavit. At this stage, I will raise a number of questions, pertaining to the conflicting interests of the parties to this application, in bid to resolving them in the very light of the subsisting rules of law, which I am obligated 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?
3. What is the position of the law in the event that there has been a partial or complete, execution of a default judgement, for which an

application has been made to a court of competent jurisdiction for a stay of execution?

4. Who is a bona fide purchaser for value without notice?
5. Is the Interested Party really a bona fide purchaser for value without notice?
6. Does the law protect the legal interest (fee simple absolute in possession) of a bona fide purchaser for value without notice in a circumstance, in which his legal interest is rooted in a default judgement that is sought to be set aside for irregularities?

I will proceed to sequentially answer the above questions, by relying on the most appropriate authorities, embedded in the literature, relating to the foregoing issue from the standpoint of the substantive and adjectival laws. Thus, contextually, by substantive law, I mean the corpus of civil and public law, creating legal rights and obligations, which the courts are bound to enforce. By adjectival law, I mean the rules of evidence and procedures, pursuant to which the substantive law is enforced. Alas! This clarification is necessitated by the complexities of the very application that is to be determined.

3.1.1 **Audi Alteram Partem: A sacred Constitutional Principle of Natural Justice.**

Concerning the first question, it cannot be denied that the audi alteram partem rule is a constitutional principle, which is tinsel as a principal of 'natural justice'. The dispensation of justice in a court of competent jurisdiction is inter alia congruent with this principle. This is simply because, it provides the court with an opportunity, to hear the other side, to guide it to make decisions that are fair, just and reasonable, in every circumstance. The courts 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 contested is merely procedural. It is not based on any form of substantive justice. Therefore, prima facie, there is every need for The Applicant to be heard. However, the question that is to be asked at this stage, is whether The Applicant was given the opportunity to be heard prior to the hearing and determination of the application that culminated in the order of 17th December, 2015.

This question is necessitated by the fact that on the face of the notice of motion of 11th April, 2019 and paragraphs 5 and 8 of the affidavit in support thereof, it is posited that The Applicant, was never served with the processes, pursuant to which the order, which she wants to set aside,

was made. However, the available evidence in the file confutes the foregoing allegation. Exhibits JS 2 and 3 of the records, pursuant to which the order of 17th December, 2015 was made, clearly depict that The Applicant, was accordingly served with the requisite processes that led to the award of the said order.

Exhibit JS 2, which is the affidavit of service, depicts that Anthony Moseray, a clerk and process server of BMT Chambers and of N0.10A Pipe Line, New England Ville, Freetown in the Western Area of the Republic of Sierra Leone, served the processes on the Defendants (including The Applicant) on the 1st of October, 2015 at 12: P.M, by personally handing same to them at N0. 14 Freetown Road, Freetown. Thus, this was essentially done in compliance with Order 10 Rules 2 and 6 of The HCR, 2007. Again, Exhibit JK 3, is a confirmation of the fact, which is evidentially uncontroverted that the said clerk and process server, on the 20th October, 2015, conducted a search at the Office of the Master and Registrar of the High Court of Justice; and discovered that no appearance was entered by either the Defendants (including The Applicant); nor their solicitors.

Further, this is done in compliance with Order 12 of The HCR, 2007, to confirm whether the Defendants (including The Applicant), did comply with the rules, concerning appearance, embedded in the said Order.

Significantly, on this point, I will conclude that there is nothing of evidential value, confirming that The Applicant was not served with the apposite processes that resulted in the Order of 17th December, 2015. Therefore, it is unjust, unfair and unreasonable, for her to invoke the audi alteram partem principle in the instant case, because she was given the opportunity to be heard. Nevertheless, 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 sacrosanct constitutional principle of audi alteram partem, to set such judgements aside, so that the affected parties can be heard.

3.1.2 **The Position of the Courts in Setting Default Judgments Aside.**

Meanwhile, nothing precludes the courts in setting default judgements aside, even in circumstances wherein processes are served on Defendants, who could neither enter appearances; nor file defenses and counterclaims, within the timeframe prescribed in The HCR, 2007. In fact, 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 concerns the position of the law in circumstances,

wherein default judgements are obtained in contradistinction to any rule of law.

Essentially, the courts are bound to give effect to every rule of law, whose existence is sanctioned by the legal system; irrespective of whether the rule is embedded in the substantive or adjectival law. Thus, procedurally, it is clear as established above, that 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; that is a matter of strictissimi juris'.

Unarguably, there are a plethora of authorities in Sierra Leone's adjectival law that are a clear reflection or manifestation of the foregoing rule. The cases of SLOF **v.** P. B. Pyne-Bailey (10th May, 1974), Yemen Company Limited **v.** Wilkins (op. cit: 382), etc. are very much instructive on this rule. 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 proceedings, leading to the order that is sought to be set aside?

Thus, there is no available evidence in the records, depicting any procedural incongruity, underpinning the proceedings, culminating in the order of 17th December, 2015. But, Paragraphs 11 and 8 of the affidavits in support and that in reply, respectively, allude to very clear points of law that should have been raised in the notice of motion. Procedurally, their appearance and presence in the said affidavits, should have warranted their discountenance and expurgation for non-compliance, with the provisions of Order 31 of The HCR, 2007.

However, because it appears that the crux of the protestations of Counsel for The Applicant, undoubtedly hinges on the legal issues, raised in those paragraphs, it would be unfair to discountenance or expunge them from the court's records. Rather, I will indeed look at their sufficiency in the circumstances of this case, to determine whether the default judgement, should or should not be set aside. First, Exhibit MSC 2, which is the power of attorney, is quite central to the original action because it concerns legal capacity.

3.1.3 **Powers of Attorney.**

The said legal instrument, was issued by the 1st Respondent, on behalf of The 2nd Respondent, to commence this action. Counsel asserts that the instrument is void in content, because its date of registration, predated the date of its notarization. Thus, the Power of Attorney, is dated 18th

November, 2014; it was registered in 2015, without any court order. And this happened one year after it was prepared. This submission touches and concerns the substantive (not adjectival) law. Powers of attorney undeniably confer capacity on persons that do not have any capacity to commence proceedings.

The position of the law on Powers of Attorney, is rationalised in CAP. 256 of the Laws of Sierra Leone, 1960, as Amended by Act N0.6 of 1964. Section 2 of Act N0.6 of 1964, transformed the original section 4 of Cap. 256 into section 4 (1). Thus, the original section 4 in Cap. 256 had no subsection. But the 1964 Amendment, has created two subsections to it: 1 and 2. The first provides for the compulsory (or mandatory) registration of instruments; and the second concerns the registration of instruments out of time. The essence of this amendment was to confer original exclusive jurisdiction on the High Court of Justice, to examine and determine the justiciability of the circumstances that might have prevented the registration of instruments, within the timeframe stipulated in section 4 (1).

Essentially, specific reference in the said subsection is made to Powers of Attorney. The subsection further distinguishes two peculiar circumstances. The first relates to registrable instruments, concerning realty in general; and the second is cognate with Powers of Attorney, in

particular. The first concerns the compulsory registration of deeds, contracts or conveyances, executed after the 9th February, 1857; and such registrable instruments, shall take effect, as against other deeds affecting the same land, from the date of their registration. Nonetheless, this principle was wrongly applied in Davies **v.** Bickersteth (1964-1966) ALR (S.L) 403, but was shrewdly overturned by Livesey Luke, C.J. in Dr. Seymour Wilson **v.** Musa Abess Civ. App. 5/79.

The second, which touches and concerns Powers of Attorney, also takes in two factual situations: those relating to the institution and defence of judicial proceedings and those that do not. For those in the former category, according to The Hon. Justice N. C. Browne-Marke JSC., whilst giving credence to the Judgement of The Hon. Justice V.M. Solomon, JSC., in Santigie Kamara **v.** Milicent Mansaray (Nee Kamara-Taylor, Lyndon Kamara-Taylor and Raymond Kamara-Taylor (Civ. App. 48/2010)...'there is no real legal requirement for powers of attorney to be registered if they concern court proceedings' (see page 4).

Thus, regarding Powers of Attorney unrelated to defence and judicial proceedings, they do really take effect immediately they are registered in the appropriate books of Powers of Attorney, in in the Office of the Administrator and Registrar Genera at Walpole Street, Freetown, in the Western Area of the Republic of Sierra Leone (see sections 4 and 5 of the

General Registration Ordinance, Cap. 255 of the Laws of Sierra Leone, 1960). Significantly, the foregoing analysis, establishes that a Power of Attorney is a registrable instrument, but there is no statutory provision that makes it mandatory that Powers of Attorney, prepared for purposes of litigation, shall be registered.

Principally, paragraph (c) of subsection (1) of section 14 of Cap. 256, makes it mandatory (not directory) that powers of attorney, executed in foreign countries, must be notarized by notaries public, commissioners of oaths etc. See the case of Santigie Kamara **v.** Milicent Mansaray (Nee Kamara-Taylor, Lyndon Kamara-Taylor and Raymond Kamara Taylor (op. cit). This is as well the legal position of other Commonwealth countries, including Ghana and Zimbabwe (see the cases of Edmund Asante **v.** Madam Kate Amponsah Suit NO. CA J4/34/2007, 20th Nov. 2008, and Prosper Tawanda **v.** Tholakele Judgement NO. HB 27/06).

Meanwhile, there is no evidence on record that Exhibit MSC II, which was executed out of the jurisdiction, though notarized by a notary public, was registered, pursuant to any court order. But did they have to register it, pursuant to a court order in a circumstance, wherein the conditionality contemplated in section 14 (1) of Cap. 256 is complied with, but the instrument, is made available for registration, prior to its first birthday? This question requires the court to first determine whether the

instrument was more than a year's old, when it was produced for registration. Thus, a deconstruction of Exhibit MSC 2, depicts that it was not up to a year old when it was registered. The document is dated 19th November, 2015 (not 18th November, 2015, as Counsel submitted). It is registered on 1st April, 2015.

My computation of time in tandem with the Interpretation Act 1971, contravenes Counsel's submission; as one year is deemed to mean twelve calendar months. Therefore, since the intervening period between the birth of the document and the date of its registration was not up to one year, there was no need for it to have been registered, pursuant to a court order. So, the submission that Exhibit MSC 2, ought to have been registered in accordance with a court order, does not hold good; hence this submission does not depict any manifest irregularity. What really amounts to a clear irregularity, is that the date of notarization of Exhibit MSC 2, came after its registration. It was registered on 1st April, 2015, but was notarized on 12th October, 2017.

Thus, the fatality of this manifest irregularity, cannot be overemphasized. The other issue of irregularity, which Counsel raises is that the defectiveness of the Power of Attorney, makes it legally expedient for the Letters of Administration, taken on 1st July, 2015, to be struck out; as it was issued by the Probate Division of the High Court of

Justice, pursuant to Exhibit MSC 2, whose authenticity has been impugned. So the manifest irregularity, characterizing the Power of Attorney, extends to the Letters of Administration, dated 1st July, 2015 {see Exhibit MSC 2 (1-2)}.

3.1.4 **Letters of Administration.**

Again, there is another Letters of Administration, which had been taken out, since the 5th November, 2013 by the 1st Defendant (Desmond Cole) in the original action. This point is also raised in Paragraph 5 of the affidavit in reply. There are now two subsisting Letters of Administration, in respect of the same realty. This is also another fatal irregularity, underpinning the proceedings, leading to the order of 17th December, 2015. In fact, both Letters of Administration cannot continue to subsist. One definitely has to be cancelled or nullified to set the records straight. That is clearly within the jurisdiction of the High Court of Justice.

However, because the action was proceeded with by default, The Respondents, ought to have accordingly complied with the law. This answers the second question raised above. Thus, since the default judgement was obtained in contravention of the foregoing legal issues embedded in the substantive law, there is a prima facie rationale, for it to be set aside. But the coming in of The Interested Party into this matter has to be examined in tandem with the rationale of setting the order

aside. However, in the circumstance, if the order of 17th December, 2015 is set aside, the alleged legal interest of The Interested Party (who now relies on the bona fide purchaser for value without notice principle), will be adversely affected.

3.1.5 **The Bona fide Purchaser for Value without Notice: A Common Law Doctrine.**

Essentially, to rely on a rule of law to bolster one's case, presupposes the production of the available evidence, to convince any reasonable tribunal of facts, that one indeed has the justification to benefit from the fruits of that rule of law. So, the evidential value of the records, must first depict that The Interested Party is indeed a bona fide purchaser for value without notice; before This Honourable Court determines whether his alleged interest (fee simple absolute in possession), should be protected in a circumstance, wherein that interest is anchored by a court order, which is deemed irregular.

Meanwhile, the bona fide purchaser for value principle is firmly embedded in business and corporate law, whose fundamental principles are themselves rooted in the law of contract. The law of real property, by its nature and contents, has continued to evolve even in our jurisdiction, consonant with a plethora of essential principles of the law of contract. One such principle is the bona fide purchaser for value

without notice, which is a notable exception to the *'nemo dat quod non habet rule'* (Atiyah, Adams and MacQueen, 2005: 372).

The essence of the applicability of this rule in the law of real property, revolves around the protection of the fee simple absolute in possession of the innocent purchaser of a realty, who has no reason to believe or know, about whatever encumbrance(s) that pre-existed a realty at the time of its purchase. Thus, the courts in the commonwealth jurisdiction, have continued to uphold and give credence to this rule of law; even in transactions underscoring mistakes and fraudulent activities and operations. Moreover, Kerr on Fraud and Mistake, 6th Edition pages 429 and 451 is quite instructive on this point. See also the case of Bailey **v.** Barnes (1894) 1Ch. 25, Corser **v.** Cartwright (1873), L. R. 8 Ch. 971, on appeal (1875), L. R. 7 H. L. 731.

Thus, the recognition and protection of this principle has gone beyond the compass of the common law. In our jurisdiction, statute has accorded it a principal simulation, which the courts are bound to uphold and give credence to. First, I will examine the applicability and workability of the principle at common law; and then proceed to explore its statutory mandatory, compulsive and exclusively inevitable applicability in our jurisdiction. There are indeed a number of decided cases in which this

innocent purchaser for value principle has been reasonably enunciated, clarified and applied in the interest of justice and fairness.

Thus, in Turay **v.** Kamara and Jarrett (1968-1969) ALR S. L Series 89, Tambiah J. A, was faced with the issue of fraud and how it affected a transaction, regarding the sale of a realty. But the purchaser claimed that he had no idea of anything fraudulent at the time of purchase. Tambiah, having examined the evidence, had this to say in pages 93 and 94:

> 'Even if the appellant succeeded in proving fraud, which he did not, he has failed to prove that the second respondent had notice of the alleged fraud at the time he became the purchaser. The deed executed by the exercise of fraud is only voidable, and if the grantee of such a deed sells the legal estate to a purchaser for value who has no notice of the fraud, the purchaser gets good title.'

Furthermore, since the facts in Camarah **v.** Macauley (1920-1936) ALR S. L. 150, are not too dissimilar with the facts of this case, I will reproduce them (as reported above) for purposes of the analysis, I will soon resort to in the determination of this application. The plaintiff brought an action against the defendant for the recovery of land, which had formed part of her deceased father's estate. The plaintiff's father died intestate in Freetown. At the date of his death the plaintiff was living in the

Protectorate and although extensive enquiries were made to discover the deceased's next of kin none were traced.

Letters of Administration of the deceased's estate were then granted to the Susu tribal ruler, who sold the land to the Defendant. When the plaintiff had of the sale she brought the present proceedings to recover the land contending that since her consent to the sale had not been obtained as required by The Intestate Ordinance (Cap. 104), s. 24, and the court had not ordered the sale, the conveyance to the defendant was invalid and she was therefore entitle to recover the property. The defendant contended that the failure to obtain the consent of the next of kin did not invalidate the conveyance since he, the purchaser, was unaware of any irregularity. Thus, the court upheld the defendant contention and chose not to invalidate his conveyance.

Moreover, in Corser **v.** Cartwright (op. cit) James L. J held:

> Where a person advances money by way of purchase or charge on an estate so vested in the hands of a trustee, unless that person is absolutely a party to a breach of trust he cannot be deprived of the estate he has acquired.

Meanwhile, most recently, in Gomez **v.** Sierra Leone National Shipping Co. (2008) SLCH 12 (10th November, 2008), The Hon. Justice D.B. Edwards J. (now C.J), accordingly upheld and gave credence to the bona fide

purchaser for value principle; and simultaneously justified its applicability to the facts with which he was faced in that matter. Significantly, the foregoing cases, clearly pinpoint the instances, relating to fraud, trusts, letters of administration and transfer of ownership, in which the courts have sought to uphold and give credence to the principle of the bona fide purchaser for value without notice. Meanwhile, as mentioned earlier, the protection of the innocent purchaser for value is even sanctioned by statute in our jurisdiction.

3.1.6 **Statutory Recognition of the Bona fide Purchaser.**

Section 8 of the Execution against Real Property Ordinance, found in Cap. 22 of the Laws of Sierra Leone, 1960, is instructive on this point. The section thus states:

> If any judgement or process by virtue of which such sale shall be made as aforesaid shall happen to be revered for error, yet the said reversal shall not be given in evidence or be of force against any bona fide purchaser under the said judgement or process, but the said purchaser, his executors, administrators or assign shall hold the land or other thing so bona fide purchased, notwithstanding a reversal of the judgement or process after his purchase, and such reversal shall only operate against the plaintiff, his executors and

administrators to compel him or them to return the value to the defendant of what he lost.

3.1.7 **Is the Interested Party a Bona fide Purchaser for Value without Notice?**

Nonetheless, in the instant case, The Applicant's Counsel submits, pursuant to the facts deposed to in the affidavits in support and that in reply, that The Interested Party is not a bona fide purchaser for value without notice. This contention is however controverted by the facts deposed to in The Interested Party's affidavit in opposition; and in his Counsel's submission to This Honourable Court. Apart from the contradictory depositions in the respective affidavits, there is nothing else to justify or disprove whether The Interested Party is genuinely claiming to be an innocent purchaser.

So, the available evidence has to be critically explored and deconstructed further to discern the genuineness of his claim. There is nothing in evidence that The Interested Party, was aware of the original action. And there is nothing of evidential value, purporting that The Interested Party had any access to the realty in question prior to 2018. The order of sale was made in 2015; and The Interested Party bought the realty in 2018, pursuant to that court order. He only came into the picture after he had acquired the realty, pursuant to an order of sale (see Exhibit MJ9).

Thus, the Master and Registrar of the High Court of Sierra Leone, executed a conveyance on behalf of The Interested Party in respect of the realty. And the conveyance is accordingly registered, pursuant to Cap.256 of the Laws of Sierra Leone, 1960. So, the legality of his duly registered conveyance cannot be challenged and controverted in any court of competent jurisdiction, by virtue of the court order, pursuant to which the Master and Registrar of the High Court, was mandated to sell and the monumental precedent in Camarah **v.** Macauley (op. cit); followed in the more recent decision in Gomez **v.** Sierra Leone National Shipping Co. (op. cit). Meanwhile, in the light of the above analysis, I will dub The Interested Party an 'innocent purchaser for value', whose acquired fee simple absolute in possession, is born in the womb of a registered conveyance, which validity is accordingly sanctioned by the apposite laws of Sierra Leone; and should therefore be protected notwithstanding the irregularities unpicked above. This finding indubitably answers questions four (4), five (5) and six (6), as sequentially posed above.

3.1.8 **Stay of Execution.**

The next point which I must now discern in this ruling, revolves around the issue of stay of execution. This begs the third aforementioned question, regarding the position of the law in the event that there has

been a partial or complete execution of a default judgment, for which an application has been made to a court of competent jurisdiction, for a stay of execution. The principal thrust of the first order is for an interim stay of execution of the order of 17th December 2015; and all subsequent proceedings thereto, pending the determination of this application. Analytically, the literature on stay of execution in and out of our jurisdiction is enormous; and seemingly straightforward.

I shall thus endeavor to summary the relevant legal literature on stay of execution; as it has continued to evolve with the determination of monumental cases in and out of our jurisdiction. However, in as much as the literature on stay of execution, is replete with well-articulated and incisive judicial decisions that I should put into context; there is a salient point that is cognate with the stay of execution that I think, I should also clarify here. Thus, a stay of execution is an intermediate act ordered by a court of competent jurisdiction between judgment and the hearing of an appeal. Thus, an order granting a stay of execution must be specific and unambiguous.

Again, it has to be made on terms subject to the usual 'undertaking,' made by the party seeking for it. Thus, if it is a monetary judgment and money is ordered to be paid to the other side, based on the undertaking, that money has to be refunded, should the appeal succeed. This principle

was clearly enunciated in James International **v.** Seaboard West Africa (Miscellaneous Applications 5/97) and Firetex International Co. Ltd. and Sierra Leone External Telecommunications **v.** Sierra Leone Telecommunication Co. Ltd. (Misc. App. 19/2002) and Basita Mackie Dahklallah **v.** The Horse Import and Export Co. Ltd. (Misc. App. 21/2005). However, in circumstances that do not relate to monetary judgments, no amount of money, can be ordered to be paid, on an undertaking that if the appeal succeeds the payment, should be accordingly refunded (see Patrick Koroma **v.** Sierra Leone Housing Corporation).

Essentially, an application for a stay of execution is made pursuant to Rules 28 and 64 of the Court of Appeal Rules of 1985. Thus, it is clear in Rule 28 that an appeal to the Court of Appeal does not amount to a stay of execution of a judgment, order, ruling or decision; and that an order for a stay is specifically obtained from the Court of Appeal. It is Rule 64 that contains the procedure, pursuant to which an application for a stay of execution can be made. That is, the applicant files the application to the High Court of Justice; and should that court refuse the application, they are at liberty to apply to the Court of Appeal for it.

However, it should be noted that Page 35 of the Third Edition of Halsbury's Laws of England (Volume Sixteen), is very much instructive on stay of execution. Paragraph 51 thus states:

'The court has an absolute and unfettered discretion as to the granting or refusing of a stay. So also as to terms upon which it will grant it, and will as a rule, if there are special circumstances, which must be deposed to in an affidavit, unless the application is made at the hearing'.

Significantly, in so many instances, Sierra Leone's Court of Appeal in developing the jurisprudence in this area of the law, has refused to make orders for stay of executions, because the parties seeking for them, were unable to convince judges about the peculiarity of the circumstances, pursuant to which such orders should have been granted; bearing in mind that it is very unfair for successful litigants to be deprived of the fruits of their judgments {see Annot Lyle (1886)11 P.D. 114 at page 116}

So, neither the High Court of Justice, nor the Court of Appeal, can make an order for a stay of execution, unless there is a good reason for doing so. However, some of the notable instances in which the Court of Appeal has refused applications for stay of execution, include S.M. Saccoh **v.** Ibrahim A. H. Dahklallah and Sons (Misc. App. 16/93), Reverend Archibald Gambala John (Executor of the Estate of Gustavus John) and Others **v.** Lamin Denkeh (1994) Misc. App. 26/93, Desmond Luke **v.** Bank of Sierra Leone (Civ. App. 22/2004), Ernest Farmer and Another **v.** Mohamed Lahai SLLR Vol. 3 P. 66 (1945) etc.

Conversely, there are also a plethora of instances, in which the Court of Appeal in its wisdom, has handed down a number of landmark decisions, in favour of applicants who showed, pursuant to their requisite affidavits' evidence, special circumstances, that warranted the Hon. Justices of that court to make numerous orders on stay of execution. Some of the Court of Appeal's decisions that are quite instructive on this point, are found in the cases of Africana Tokeh Village **v.** John Obey Development Investment Co. Ltd. (op. cit), Firetex International Co. Ltd. and Sierra Leone External Telecommunications **v.** Sierra Leone Telecommunication Co. Ltd. (op. cit), Lucy Decker **v.** Goldstone Dicker (Misc. App. 13/2002) etc.

The reasonable inference that can be drawn from the foregoing authorities, is rationalised in the following considerations:

1. The grant and refusal of a stay of execution is subject to the discretion of the court.
2. The court's discretion must be justly, fairly and reasonably exercised in accordance with established principles.
3. In circumstances wherein a stay of execution is granted on terms, the terms must not be onerous.

4. The applicant must show a special (peculiar) circumstance, on the basis of facts deposed to in an affidavit, concerning the reason why the stay, should be granted.
5. The applicant must establish that there exists a good ground of appeal.

Thus, the question that is to be addressed at this stage is what really constitute a special circumstance that should be established by the applicant for a stay of execution, in a bid to deprive the other side of the fruits of their judgments? This obviously depends on the specificities of the facts of each case. What may constitute a special circumstance in one case may not amount to a special circumstance in another case. Thus, the Hon. Justice George Gelaga King, J A., defines a special circumstance as 'a circumstance beyond the usual; a situation that is uncommon and distinct from the general run of things'. In Monk **v.** Bartram (1891) 1 AB 346, Esther M.R. in clarifying what is meant by special circumstance, stated:

> It is impossible to enumerate all the matters that might be considered to constitute special circumstances, but it may certainly be said that the allegation that there had been a misdirection or that the verdict was against the weight of the evidence or that

there was no evidence to support it are not special circumstances on which the court will grant a stay of execution.

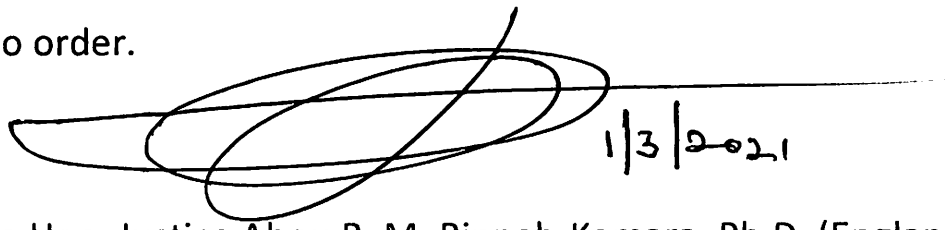
Furthermore, in TC Trustees Limited **v.** J. S. Darwen (Successors) Limited 2 Q.B 295, the Court of Appeal, in inter alia establishing the special circumstances, pursuant to which a stay of execution can be ordered, affirmed that the circumstances must be relevant to a stay, and not to a defence in law, or belief in equity, which must be raised in the action. The special circumstances must be relevant to the enforcement of the judgment; and not the judgment itself. Nonetheless, the principal thrust of the aforementioned third question purls around: whether it is possible to stay the execution of a Judgment which has either been partially or completely executed.

This point was clearly addressed in Africana Tokeh Village **v.** John Obey Development Investment Company Limited (op. cit). The Court of Appeal thus inter alia held in this case that it has an unfettered jurisdiction and power to order a stay of execution and may even do so when, though a writ of possession may have been issued and executed; provided that the application had been made and rejected in the High Court of Justice, pursuant to Rules 28 and 64 of the Court of Appeal Rules of 1965.

On this authority, I will answer the third aforementioned question, by saying that in the event that there has been a partial or complete

execution of a default judgment, application for a stay of execution can still be granted by a court of competent jurisdiction. However, an intense scrutiny of the affidavit in support of the application, does not depict anything amounting to a special circumstance that should warrant this Bench to stay the execution of the Judgment of 17th December, 2015. An attempt to so do will deprive the Plaintiffs of the fruits of their judgment, which makes it clear that every other beneficiary (including the Applicant in this case), shall equally benefit from the proceeds of the sale of the realty, which the innocent Interested Party bought for value without notice. I will not concede to the submission by Counsel for the Applicant that his client did not benefit from the proceeds of sale. The order of sale is quite clear; and Counsel knows exactly what to do to secure the benefits of his client in accordance with that sale. I will thus dismiss the application (in its entirety), as untimely, unjust, unfair and unreasonable, because of the peculiarity of the circumstances, pursuant to which it was made. Simultaneously, I will make no order as to cost.

I so order.



The Hon. Justice Abou B. M. Binneh-Kamara, Ph.D. (England).

Justice of the Superior Court of Judicature of Sierra Leone.